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No. 1187

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE MEDICAL AND DENTAL STAFF
OF YORK HOSPITAL,

Petitioner

v.

MALCOLM D. WEISS, D.O.,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTERSTATEMENT OF THE CASE

Within the York, Pennsylvania Medical Service Area ("MSA") there are only two providers of inpatient hospital services. One is York Hospital, a powerful institution with over 450 beds, 2,500 employees, a market share exceeding 80 percent of the hospitalization provided in the York MSA and exclusive control over highly complex tertiary care services essential in the treatment of a wide variety of disorders. (PA-9-10; 3496a-3470a; 3862a; 4963a-4964a).[1]

York Hospital awards "staff privileges" by which physicians become members of the Hospital Medical Staff and are licensed to admit and treat patients at the Hospital. (PA-15-16). Without such privileges, a physician cannot effectively admit, follow, and treat patients at York Hospital. (PA-11; 3802a-3803a; 4979a; 5262a-5265a).

The members of York's Medical Staff are not employees of the Hospital. (3801a-3802a; 4140a-4147a; 4979a; 5262a-5265a; 5960a; PA-58-59). Instead, they are physicians "in private practice in the community." (3801a). From an economic standpoint, their independence from the Hospital and one another is complete. According to the Hosptial's Vice President of Medical Affairs, the members of its Staff are "independent of any financial arrangement with the Hospital." (3801a-4140a-4141a). The fees charged by the Hospital and the members of the Medical Staff are independently determined and separately collected. (PA-58-59; 3801a-3802a; 4140a-4147a; 4979a; 5262a-5205a; 5960a). Capital is not pooled. (*Ibid*). Profit and loss is not shared. (*Ibid*). With respect to granting qualified physicians access to the Hospital, the economic interests of all the incumbent members of the Medical Staff, regardless of specialty, is to exclude, while the economic interest of the Hospital is to admit. (3870a-3878a; 3948a-3963a). Yet, because of York Hospital's dependence on the members of its

1. References to "PA" are to the pages of the Appendix to the Petition for a Writ of Certiorari. References to "RA" are to Respondent's Appendix to this Brief in Opposition to the Petition for a Writ of Certiotari. Four digit references followed by a small letter "a" (e.g., "3469a") are to the Appendix on appeal filed in the United States Court of Appeals for the Third Circuit.

Medical Staff for business, it has a strong financial incentive to acquiesce in the exclusionary propensities of its Medical Staff. See: Dolan & Ralston, "Hospital Admitting Privileges and the Sherman Act," (hereinafter "Dolan & Ralston"), 18 *Houston L. Rev.* 707, 753 (1981).

Recognizing their desire for a "self-governed Medical and Dental Staff" the physicians at York Hospital adopted Bylaws organizing themselves as an unincorporated association, the Petitioner here. (3802a-3803a; 5960a). The York Hospital Board of Directors delegated all decision making responsibility for determining the criteria for staff privileges and compliance with those criteria to the petitioner and retained the very limited responsibility of ascertaining only whether the Medical Staff had afforded an applicant procedural due process in considering his application. (4150a-4152a; 4777a-4778a; 4779a-4780a; 3821a; 4501a-4502a).

Although separately schooled, both osteopathic physicians ("D.O.s") and allopathic physicians ("M.D.s") are equally qualified for state licensure to practice medicine and surgery within the Commonwealth of Pennsylvania. *See*, 63 Purdon Stat. Ann. §271.2 *et seq*. & §421.2 *et seq*. At trial, both York Hospital and its Medical Staff admitted that there was "no difference whatsoever" in the training, background, competence, qualifications, and references for the two groups. (PA-5 & PA-6; 3806a-3809a; 4014a-4015a). The York Medical Staff conceded that admission of osteopathic physicians to the Medical Staff of York Hospital "would in no way adversely affect the standard of care now provided at York Hospital." (4025a) Nevertheless, both the Corporate Charter of York Hospital and the Bylaws of its Medical Staff expressly barred D.O.s from practicing at York Hospital.

At the end of 1974, York Hospital changed its Corporate Charter to remove its bar to D.O.s practicing at York Hospital. (PA-12; 3501a). However, since the Medical Staff actually controlled access to staff privileges at the Hospital, osteopaths continued to be barred from admission to the Hospital because of an express provision in the Medical Staff Bylaws. (PA-12; 4501a). Nevertheless, in the Spring of

1976, plaintiff, an osteopathic physician, applied for staff privileges at York Hospital. (PA-12; 3987a; 3943a). He threatened legal action if the barriers to entry contained in the York Medical Staff Bylaws were not removed. (PA-12; 5952a).

The leaders of the Medical Staff were opposed to permitting osteopathic physicians on the Medical Staff at York Hospital, solely out of loyalty to the economic interests of their breathren. (3872a-3880a; 3953a; 3948a-3950a; 3988a-3996a; 4549a; 5859a; 5950a). Although there was no question about their training or competence, there was fear expressed that allowing D.O.s staff privileges would adversely affect the income of M.D.s by producing competition. (*Ibid.*). Many of the M.D.s at York Hospital had "outright hostility" to permitting osteopathic physicians to join their inner sanctum. (5895a).

The Medical Staff consulted with the Hospital's legal counsel who offered the opinion that they were required to refrain from discriminating against D.O.s. (5951a). However, the Staff "did not feel obliged to do so on the basis of legal counsel's opinion." (*Ibid*). Thus, in direct contravention of what they knew the law to require, a consensus was formed among the physicians on the Medical Staff that their Bylaws should not be amended to allow osteopaths on the Staff of York Hospital absent some assurance that "not that many would be applying," that such an amendment would not affect any "major alignment" in the Medical Staff, and that only "a few" D.O.s would be accepted on the Staff. (4497a-4500a; 4516a-4518a; 4026a; 2084a-1-2805a).

Accordingly, in order to stave off legal attack, the Medical Staff Bylaws were amended in November of 1976 to eliminate the formal barriers to the admission of osteopathic physicians to the York Medical Staff, (3813a; 4495a-4497a), but the change was purely cosmetic. It was accompanied by the informal adoption of discriminatory and medically unjustifiable standards for reviewing the qualifications of osteopaths so as to implement the Staff's plan to accept only a few token D.O.s. (PA-12-13).

Dr. Merle Bacastow, a member of the Medical Staff and Vice President of York Hospital in charge of its medical

affairs, described the criteria applied to granting staff privileges to M.D. applicants:

"Q. Is it a fact, Doctor, that at York Hospital that the procedure applicable to the applications of medical doctors is that if there is adverse information in their file, but they are licensed to practice medicine in the state of Pennsylvania, their application is accepted and the Hospital closely monitors their behavior after acceptance to determine whether there is going to be any problems?

THE WITNESS: Yes." (4519a-4160a)

By reason of this presumptive entitlement to privileges, virtually every M.D. who applied for staff privileges at York Hospital received them. (3818a-3820a). In the ten years preceding the date of the trial, petitioner received over 200 applications for privileges by M.D.s. (PA-13; 3818a-3819a). During this period, the only M.D. to ever be denied privileges was a physician suffering from acute psychosis. (PA-13; 3820a). However, the presumption enjoyed by members of the "M.D. club" at York Hospital did permit the admission of a number of M.D.s who "had serious deficiencies in medical knowledge" and who were "not able to provide total patient care." (PA-13; 4719a-4720a; 5295a-5312a).

The presumptive entitlement to York staff privileges enjoyed by medical doctors was not to be afforded to osteopathic physicians. While "personality deficiencies" were not considered a sufficient basis to exclude a medical doctor from the Staff, such "deficiencies" were considered an acceptable basis on which to foreclose privileges to osteopathic physicians. (PA-13; 3819a-3820a; 4071a-4074a; 4089a-4090a; 4158a-4159a; 5859a; 5899a; 5900a). Moreover, the credentials of osteopathic physicians, including their "personality", were to be subjected to a "strict scrutiny" which included unprecedented "surveys" of the entire medical community for adverse information, rumors and gossip. (PA-13; 4026; 4070a-4074a; 4080a-4081a; 4129; 4160a-4163a; 5899a; 4345a4347). If any difficulties were even suggested by such a survey, the D.O. was to be excluded from the Medical Staff. (*Ibid*).

After the Medical Staff Bylaws were amended, the application of Drs. Weiss was processed. By February of 1977, his file was complete, his credentials were in order and his application had received the required endorsements. (3817a; 4058a-4067a). Routine protocol would have dictated approval by the Medical Staff Executive Committee, the body charged with managing the general affairs of the Medical Staff. (4070a). However, in a dramatic departure from the procedures applied to allopathic applicants, the Executive Committee declined to consider the application and directed an unprecedented survey of the entire medical community to garner adverse information. (4107a-4108a; 4070a; 4080a-4081a; 4089a-4127a; 4129a).

This unprecedented witch hunt succeeded in ferreting out little more than gossip concerning Dr. Weiss' "untasteful" behavior at squash matches. (4071a; 5886a-5887a; 5894a). There were, however, two letters, one from Dr. Worthwein and one from Dr. Kamer, which raised some vague questions concerning Dr. Weiss' professional competence. Yet, the petitioner received reliable information from several sources that Dr. Worthwein's conclusions were unfounded and Dr. Kamer's report was revealed as a malicious lie. (4353a-4355a; 4119a-4122a; 5895a-5896a). Indeed, the unprecedent investigation made pursuant to the Executive Committee's directive revealed that far from being incompetent and unprofessional, Weiss was the best osteopathic physician practicing in the York MSA. As the staff's Family Practice Credentials Committee itself told Dr. Weiss:

> "He was specifically told that almost everybody with whom we spoke acknowledged him to be an intelligent, competent, conscientious physician whose care of his patients in the Hospital was quite competent. He was told that the Chairman of his department suggested that he was probably the best general practitioner." (5895a-5896a).

Nevertheless, the Medical Staff Executive Committee rejected Weiss' application, not on the basis of the Kamer-Worthwein charges, but solely based on the gossip that his personality, as manifested on the squash court and at "cov-

ered dish social affairs," was deficient. (3819a; 5956a-5958a; 4071a; 4880a; 4884a-4885a; 5894a; 5895a).

Defendant relies on the pretrial deposition testimony of Donn Cohen, a lawyer who chaired York Hospital's Board of Directors to support the claim that the Board did not simply accept the Medical Staff's decision, but gave full consideration to the merits of his application and decided, independently, to reject it. Notably, Mr. Cohen did not testify at trial. What the trial record does show is that in connection with Weiss' application the Board followed its policy to simply rubber stamp the staff privilege decisions made by the Staff. (3821a; 4501a-4502a). According to one witness who did testify at trial, Mr. Cohen told the Medical Staff that the Board would "back up" any decision reached by it on Weiss' application. (4433a-4435a). Moreover, the minutes of the relevant Board meeting show that the Board did not give full consideration to Weiss' application but expressly limited its function to that of "an appellate review body." (1690a). They also show that the only decision actually made by the Board concerning Dr. Weiss was contained in a resolution that "Dr. Malcolm Weiss has received due process and has thereby been afforded fair and adequate hearing procedures." (1693a).

The record was uncontroverted that the "denial of privileges to a physician is a serious adverse professional event which is likely to besmirch the professional reputation of such a physician." (PA-101). The York Medical Staff knew that. They knew that the treatment of Weiss' application would receive attention and publicity throughout the York MSA as a harbinger of what osteopaths could expect at the hands of York Hospital. (4054a-4055a; 4172a-5173a). Accordingly, the treatment afforded Weiss "could reasonably be anticipated to cause [other] osteopathic physicians to refrain from applying for staff privileges at York Hospital." (PA-102). Thus, before Weiss instituted suit in the district court in January of 1980, petitioner's policy of discrimination had succeeded in foreclosing access to York Hospital's unique and essential facilities to all but one osteopathic physician.

Dr. Weiss instituted this action on behalf of a class seeking primarily declaratory and injunctive relief. His Complaint alleged that the conduct of York Hospital and its Medical Staff towards osteopathic physicians was a boycott and unlawful under Sections 1 and 2 of the Sherman Act. After several unsuccessful attempts by defendants to procure writs of mandamus and prohibition against District Judge Malcolm Muir, the case was tried before a jury of twelve. (PA-23). At the conclusion of the evidence, the trial court proposed to submit the case to the jury in the form of special verdict questions. Plaintiff contended that a modified per se rule applied in view of the Hospital's market power and the concession that there was no legitimate basis to discriminate between M.D.'s and D.O.s and that a restraint of trade would be made out by a jury finding that there was a conspiracy to deny osteopathic physicians equal access to York Hospital. Defendants contended that a full scale rule of reason approach was required and thus sought the submission of a question to the jury asking whether any conspiracy by defendants "unreasonably restrained trade." Seeking to avoid a retrial the facts, the Court submitted both questions to the jury. In defining the analysis required by them in order to answer the question as to whether any conspiracy by defendants restrained trade under the rule of reason approach, the Court gave, verbatim, the charge requested by the defendants. See: 3410a & 5689a. All told, the trial court submitted 42 Special Verdict Questions with 122 subparts for answer by the jury. (PA-23)

After two days of deliberation, the jury returned a unanimous verdict. Among other things it found that: (1) The conduct of defendants concerning the plaintiff and the plaintiff class occurred in and had a not insubstantial effect on interstate commerce; (2) Plaintiff would have received staff privileges at York Hospital but for the fact that he was a D.O. rather than a M.D.; (3) The procedures utilized by defendants in denying Weiss' application for staff privileges were unfair taken as a whole; (4) There was a conspiracy to deny plaintiff staff privileges because he was an osteopathic physician; (5) The Medical Staff conspired to deny or im-

pede reasonable, fair, equal and full access to staff privileges at York Hospital by osteopathic physicians; (6) This conspiracy constituted an unreasonable restraint on interstate commerce; and (7) York Hospital had monopoly power over the furnishing of inpatient hospitalization services supplied by hospitals and their medical staffs in the York MSA. (PA-99-100). Based on these findings, the District Court concluded that the York Medical Staff had violated Section 1 of the Sherman Act and that York Hospital had violated Section 2 of the Sherman Act. It entered a general prohibitory injunction from which defendants appealed assigning twelve different errors. See RA-1-75

In an opinion authored by Circuit Judge Becker, the United States Court of Appeals for the Third Circuit affirmed the judgment against Petitioner under Section 1 and reversed the finding of liability against York Hospital under Section 2.[2] Initially, the Court of Appeals found substantial evidence to support the jury's conclusion that Petitioner discriminated against D.O.s because they were competitors, and not for any reasons related to assuring quality of care. (PA-66; PA-92). The Court did not reach the question of whether there was evidence that any third persons conspired with the Medical Staff to effectuate this discriminatory policy. That was unnecessary because the Staff itself was a combination of independent economic entities sufficient to supply the joint action requirement of Section 1 of the Sherman Act. (PA-58-62).

Although defendants never raised the question on appeal, the Third Circuit's Opinion went on to consider which level of Sherman Act scrutiny, the rule of reason or the per se rule, was applicable to the Staff's boycott of osteopathic physicians. Here, the Court found, defendants' conduct restrained trade regardless of which of the two analytical approaches was employed,

> "because (1) Weiss met his burden of production and persuasion that the purpose and effect of the defend-

2. The Third Circuit's decision to reverse to the finding of liability under Section 2 of the Sherman Act as against York Hospital is the subject of a separate Petition for a Writ of Certiorari by plaintiff which was docketed in this Court at October Term, 1984, No. 1166.

ants' discriminatory conduct was to 'foreclose so much of the market from penetration by [the M.D.s'] competitors [i.e., the D.O.s] as to unreasonably restrain competition in the effected market, the market for [inpatient medical care],' See *Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S.Ct. 1551, 1568 n. 51 (1984), and (2) the defendants — who relied solely on the defense that they had not discriminated against D.O.s — made no attempt to counter this evidence." (PA-70, PA-73-75).[3]

ARGUMENT: REASONS FOR DENYING THE WRIT

A.

This is not the first case to hold that a hospital staff privileges decision violates the Sherman Act under a per se theory of restraint, or otherwise. In fact, the first and only case to reach this Court on the issue, *American Medical Ass'n v. United States*, 317 U.S. 519 (1943), affirmed a finding of *criminal* culpability under Section 1 of the Sherman Act against an association of physicians like Petitioner. There, the association sought to persuade hospitals in metropolitan Washington, D.C. to deny staff privileges to physicians who were affiliated with prepaid health plans. *Id.*, 317 U.S. at 530. Like the petitioner here, the association defended by asserting that somehow this manifest attempt to squelch competition from a competing style of practice was necessary to prevent poor medical care. Yet, this Court affirmed the convictions without elaborate market analysis because of the obvious anticompetitive impact of the boycott and the fact that there was sufficient evidence from which a jury could conclude that the defendant was not "acting only to protect its organization, regulate fair dealing among its members, and maintain and advance the standards of medical practice." *Id.* at 533.

Until the case at bar, no other court has been called on to decide the lawfulness, under the Sherman Act, of a physician sponsored, marketwide foreclosure of hospital staff

3. The Court also concluded that there were "no grounds for distinguishing Weiss and the class under Section 1" — a position which defendants have conceded. (PA-76).

privileges which is unsupported by any legitimate explanation.[4] This is no measure of the inappropriateness of applying the imprimatur of antitrust laws to such conduct, but reflects the fact that such conduct is so obviously anticompetitive and unlawful that no group of physicians has had the gall to engage in such behavior and litigate concerning it.

Petitioner is correct that health care costs are spiralling out of control in this nation.[5] However, it is almost laughable to suggest, as does petitioner, that the costs of litigating several antitrust cases could materially contribute to the 758 billion dollar annual national health care bill. Just the opposite is true. Judicial inadvertence to enforce the antitrust laws in the health care field, particularly in the area of staff privileges, would only exacerbate the escalation of the intolerably high cost of health care.

All of the market analysts who have considered the problem agree that rising health prices are the result of demand increasing out of relation to supply.[6] Available research suggests that in large measure this market instability is the product of a dominant group of physicians concerting their efforts to prevent competition and innovation by competing groups of physicians and styles of health care deliv-

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4. Footnote 2 of the Petition for Certiorari implies the contrary. However, some of the cases cited in footnote 2, such as *Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S.Ct. 1551 (1984) do not involve the horizontally concerted actions of competing physicians and thus are not boycott cases. In the remaining cases cited in that footnote, the denial of hospital staff privileges was claimed to be justified by substantial procompetitive benefits such as promoting quality of care. In this case, there was horizontally concerted action by the members of York Hospital's Medical Staff to exclude a competing group from access to York Hospital. Petitioner did not claim that such discrimination was justified. (PA-70 & 73-74). Rather, it simply denied that the discrimination existed, a factual question which was resolved against it by the jury, the District Court, and the Court of Appeals. (*Ibid.*)

5. *See generally*, M. Fletcher, *Economics and Social Problems*, 290 (1979); Drury & Enthoven, "Competition and Health Care Costs", in *The Economy in the 1980's, a Problem for Growth and Stability*, 393-394 (M. Boskin, ed. 1980).

6. See: M. Fletcher, *Economics and Social Problems, supra* at 290.

ery.[7] This abuse finds its most virulent expression in the area of staff privileges. Here, the commentators suggest, physicians frequently exploit their control over hospital access decisions to withhold privileges from competing groups of physicians so as to artificially restrict the supply of providers able to furnish inpatient services and thereby raise the price which incumbent physicians are able to charge.[8] As Professor Havighurst observed:

> "[B]ecause staff privileges are administered primarily by physicians who are competitors of the applicant, antitrust principles apply and their application must reflect the recognition that this substantial power is probably more hazardous to competiton and innovation than any other entrusted to the medical profession."[9]

By applying a per se rule to unjustified efforts of physicians to exclude their competitors from hospital factilities which are competitively essential, the Third Circuit's opinion here remained true to this Court's decision in the *American Medical Association* case and confirmed the vitality of the antitrust laws as a workable tool to restore the natural

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7. Havighurst & King, Private Credentialling of Health Care Personnel," 9 *Am.J. Law and Medicine* 131, 172-173; J. Berlant, *Profession and Monopoly* (1975); E. Freidson, *Profession of Medicine: A Study of the Sociology of Applied Knowledge* (1971); E. Freidson, *Professional Dominance The Social Structure of Medical Care* (1970); Lipscomb, "A Political Economic Theory of the Dental Care Market," 72 *Am.J. Pub. Health*, 665 (1982); P. Starr, *The Social Transformation of American Medicine* (1983); *Comment*, "Antitrust Scrutiny of the Medical Staff Plan," 36 *Maine L.Rev.* 311, 314 (1984); Dolan & Ralston, *supra*, 18 *Hous. L.Rev.* at 739 (1981).

8. See: Comment, "Antitrust Scrutiny of the Medical Staff Plan," 36 *Maine L.Rev.* 311, 328 (1984); Dolan & Ralston, *supra*, 18 *Hous. L.Rev.* at 716 & 744 (1981); Kissam, Webber, Bigus and Holzgraefe, "Antitrust and Hospital Privileges: Testing the Conventional Wisdom," (hereinafter "Kissam & Webber") 70 *Calif.L.Rev.* 596, 601 & 609-11 (1982); Leibenluft & Pollard, "Antitrust Scrutiny of the Health Professions. Developing a Framework for Assessing Private Restraints," (hereinafter "Leibenlulft & Pollard") 34 *Vanderbilt L.Rev.* 927, 932 (1981).

9. Havighurst, C.C. "Professional Restraints on Innovation and Health Care Financing" (hereinafter "Havighurst") 1978 *Duke L.J.* at p. 366.

balance of supply and demand in the health care market.[10] Yet, by recognizing at the same time that the more generous rule of reason analysis applies where privilege decisions are made in furtherance of some legitimate procompetitive values, such as promoting the quality of health care, the decision does not interfere with those aspects of the medical credentials process which promote public health and safety. Moreover, this dichtomy is consistent with the regulatory scheme in most states which generally prohibits medically unjustified denials of privileges and specifically forbids discrimination between M.D.s and D.O.s in gaining access to staff privileges.[11]

Petitioner raises the specter that the Third Circuit's rule in this case will encourage claims that legitimate privilege decisions are antitrust violations and that this prospect will chill physicians in the exercise of those credentialling activities contemplated by various state statutes and the industry's plan of self-regulation. The fact that this chill has not occurred in the forty years since the *American Medical Association* decision is strong evidence that the danger does not exist. Moreover, the risk that a rule of law will be abused is certainly no reason not to have the rule. Considerable protection against abuse exists. One such protection is the cost of antitrust staff privileges litigation itself. Petitioner estimates that it costs Two Million Dollars to litigate a staff privileges case under the antitrust laws. See Petition for Certiorari (hereinafter "*Petition*") at p. 15, n. 19. It is

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10. The commentators agree, as well, that physician sponsored discrimination in granting staff privileges for competitively important hospital facilities, without substantial procompetitive justification, is unlawful regardless of which line of Sherman Act analysis is used. *See:* Kissam & Webber, *supra*, 70 *Calif. L.Rev.* at 604, 651 & 658; Drexel, "The Antitrust Implications of the Denial of Hospital Staff Privileges," 39 *Univ. Miami L.Rev.* 207, 221 (1982); Comment, Antitrust Scrutiny of the Medical Staff Plan, 36 *Maine L.Rev.* 311, 312, 324 & 333 (1984). *See also, Blue Shield of Virginia v. McCready*, 104 S.Ct. 2540, 2543-44 n. 4 (1982). *Williams v. St. Joseph Hospital*, 629 F.2d 448, 453 (7th Cir. 1980); *Feminist Women's Health Center v. Mohammad*, 586 F.2d 530, 546-47 (5th Cir. 1978).

11. See Compendium of Laws, annexed hereto as Appendix "B", RA-76-79).

extremely unlikely that a disappointed privilege applicant would be willing or able to shoulder such a financial burden, particularly if his case is not meritorious. Moreover, Rules 11 and 56 of the *Federal Rules of Civil Procedure* exist as a substantial prophylactic against the prosecution of meritless claims.

To the extent that petitioner seeks any greater deference from the courts in determining the ultimate question of whether physician sponsored denials of hospital privileges have untoward anticompetitive effects simply because doctors are involved, it seeks a special solicitude under the law which is altogether inappropriate.[12]

B.

Fundamental to the judicial sensibility of this Court is the notion that the Court "reviews judgements, not statements in opinions," and that it will not render advisory opinions on abstract legal questions which are not germane to the outcome of litigation.[13] Moreover, it is essential to the common law adjudicatory process employed by the Court that the parties raise all legal arguments on which they rely at each stage of litigation and appellate review. Thus, this Court has repeatedly ruled that absent extraordinary circumstances it will decline to exercise its power of review over questions which have not been raised by the litigants in the lower courts.[14] Application of these princi-

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12. *See, Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S.Ct. 1551, 1565 n. 42 (1984); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348-51 (1982); *National Gerimedical Hospital v. Blue Cross*, 452 U.S. 378 (1981); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 686-89 (1978).

13. *See, FCC v. Pacific Foundation*, 438 U.S. 726, 734-35 (1978); *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956); *Herb v. Pitcairn*, 324 U.S. 117, 126 (1950); *United States v. Fruehauf*, 365 U.S. 146, 157 (1961).

14. *Hoover v. Ronwin*, 104 S.Ct. 1989, 1998 n. 25 (1984); *F.T.C. v. Grolier, Inc.*, 103 S.Ct. 2209, 2212 n. 6 (1983); *Heckler v. Campbell*, 103 S.Ct. 1952, 1958 n. 12 (1983); *Rogers v. Herman Lodge*, 102 S.Ct. 3272, 3281 n. 10 (1982); *Youngberg v.Romeo*, 102 S.Ct. 2452, 2458 n. 19 (1982); *Delta Air Lines, Inc. v. August*, 450 U.S. 754, (1981); *Steagald v. United States*, 451 U.S. 204, 210-11 n. 5 (1981); *Dotland v.*

ples requires that the instant petition be denied.

The main question raised by the Petition for Certiorari is whether a per se rule should have been applied to measure the lawfulness of the restraint created by the Medical Staff's refusal to grant osteopaths equal access to York Hospital's facilities. Because the jury found that the Petitioner's exclusion of osteopathic physicians unreasonably restrained competition under the more stringent rule of reason charge requested by Petitioner, the issue of which mode of analysis to use became moot. Accordingly, when the Petitioner appealed to the Third Circuit, it simply did not raise the issue.[15] Thus, the Court of Appeals' discussion of which level of Sherman Act scrutiny to apply constitutes a gratuitous opinion on the law not essential to the Court's judgment.

Moreover, even though the Third Circuit ruled that the application of a per se rule was appropriate in view of Petitioner's failure to offer any justification for the obvious anticompetitive consequences of its boycott, the Court also held that petitioner's discrimination against osteopathic physicians unreasonably restrained trade under the more expansive rule of reason analysis. See: PA-75. In order to prevail here, therefore, petitioner must not only persuade this Court to accept its view on the question presented, but it must also obtain a decision in its favor on the question of whether its conduct restrained trade under the rule of reason analysis. However, the Petition for Certiorari does not present this issue for review, nor could it in view of the position taken below. Thus, petitioner's request that this

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Rawlison, 433 U.S. 321, 323 n. 1 (1977); *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 33-34 (1977); *United States v. Lovasco*, 431 U.S. 783, 788 n. 7 (1977); *Cort v. Ash*, 422 U.S. 66, 72 n. 6 (1975); *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 147 n.2 (1970).

15. It was not among the twelve questions presented in the Petitioner's brief on appeal. See RA 11-14. Indeed, the only mention of the per se rule there was buried in a two sentence footnote which made no objection to the District Court's rule of reason charge or the propriety of the jury's conclusion, under that charge, that defendant's conduct unreasonably restrained trade. See RA-48.

Court determine whether a per se rule should apply is immaterial to the outcome of this case and improperly requests an advisory opinion on an abstract issue.

Secondly, the petitioner takes the position here that York Hospital and its Medical Staff "are a single enterprise for purposes of §1 of the Sherman Act" and that the Medical Staff thus cannot be considered a combination of independent entities under that Act. See *Petition* at p. 19. This position is completely inconsistent with that which the defendants successfully urged in the Court of Appeals to defeat the judgment against York Hospital under Section 2 of the Sherman Act. There, Defendants specifically argued that the offense of monopolization could not made out by proving a denial of access to noncompetitors of the monopolist in an adjacent market. Accordingly, petitioner took the position that York Hospital and the members of its Medical Staff were separate entities for purposes of antitrust analysis such that the Hospital did not compete with the excluded osteopaths and therefore there could be no liability for denying staff privileges to D.O.s under Section 2. (PA-88-90). To paraphrase the Petition for Certiorari, Petitioner: "seeks to have its cake and eat it too. Either York Hospital and its Medical staff are a single entity (in which event they would be liable for excluding the competing D.O.s under their theory of monopolization) or they are not a single entity (in which event the Staff is an association of competing entities supplying the combination element of a Section 1 offense)." See *Petition* at p. 30, n. 32. Since the position conveniently taken by petitioner with respect to the issue of whether it may be regarded as a combination of independent entities is one which is inconsistent with the position urged and accepted below, review by certiorari is inappropriate.

Finally, the Petition for Certiorari claims that the record presents an issue as to whether the adverse effect on commerce required by Section 1 of the Sherman Act is made out by proof that defendants' general business activities affected commerce or whether the law requires proof that the alleged illegal activities of defendants themselves affected commerce. The Petition also questions whether

the evidence here was sufficient under either test. These putative issues were simply never raised, argued, or decided in this litigation.

At trial, the jury found that defendants' activities "concerning the plaintiff and the plaintiff class" (not their general business activities) had a substantial effect on interstate commerce. (PA-99). Defendants' motions for a directed verdict and brief on appeal never challenged the sufficiency of the evidence to support such a conclusion. (4569a-4570a; RA-60-62). On the contrary, as the Third Circuit found, they expressly "conceded" that if it was correct to focus on the effect of the alleged anticompetitive conduct on defendants' activities in interstate commerce, then the "evidence supports the jury's and the Court's conclusion that the effect on commerce was 'substantial and adverse'." (PA-81). Relying on a Pennsylvania District Court decision, *Cardio-Medical Ass'n v. Crozer-Chester Medical Center*, 536 F.Supp. 1065 (E.D. Pa. 1982), what defendants claimed was only "that in any denial of hospital privileges case the only relevant jurisdictional inquiry" should concern the effect of defendant's anticompetitive activity on "the *plaintiff's* activities in interstate commerce," an effect which plaintiff did not even try to prove. (RA-61; PA-81). The only question which Defendants presented for review by the Third Circuit concerning interstate commerce reflected the limited nature of the issue which defendants raised:

> "8. Did the plaintiff and class fail to establish antitrust jurisdiction where there was no evidence that the alleged violations affected the interstate commerce of the plaintiff or any class member?" (RA-14).

Its analysis in the Court of Appeals was necessarily limited to that issue. See: RA-60-62.

During the pendency of Petitioner's appeal, the Third Circuit reversed the District Court's ruling in *Cardio-Medical* and held that an adverse effect on competition was not limited to proof of an effect on plaintiff's commerce but could be shown by reference to the activities of a defendant or third party in commerce. See PA-81 & *Cardio-Medical Associates v. Crozer-Chester Medical Cen-*

ter, 721 F. 2d 68 (3d Cir. 1983). In this case, the Circuit Court simply applied its *Cardio-Medical* ruling to the issue which defendants presented.[16] See PA-81-82. Petitioner has not presented that issue here.

C.

Petitioner seeks a Writ of Certiorari to review the decision of the Court of Appeals that it was a "combination" for purposes of Section 1 of the Sherman Act. In support of that request for review, Petitioner proposes that the record here compels the conclusion that York Hospital and the members of the Medical Staff are a single enterprise for purposes of the Sherman Act because "in performing credentialing functions the members of the York Medical Staff were required to have an identity of interest with the Hospital." See *Petition* at pp. 18-19. Alternatively, the Staff claims that there was "no proof" of a conspiracy because "all staff credentialing decisions were made 'unilaterally' by York Hospital's Lay Board of Directors." See *Petition* at pp. 18 & 21-22. Incredibly, to support these notions, the Petitioner does not point to a single item in the trial record.[17] Rather, it generously indulges in citation to federal and state regulations and the accreditation standards of the JCAH[18] and makes allusions to some scant pretrial mate-

16. In *Cardio-Medical Ass'n v. Crozer-Chester Medical Center*, 721 F.2d 68 (3rd Cir. 1983), the Third Circuit ruled that an "infected activities" test was appropriate under Section 1 of the Sherman Act. *Id.* at 74-75. By the interal operating rules of the Circuit, the Panel in this case was obliged to follow that precedent to the extent that it was called upon to decide the same issue. Moreover, the Circuit Court's decision here manifested its view that the infected activities test was the appropriate one when it observed that the law requires that "the proscribed conduct . . . has a 'substantial adverse effect' on interstate commerce." See PA-80.

17. The trial records begins in the Appendix on Appeal at page 3437a. The scant reference to the proceedings in the lower court which Petitioner makes in its discussion of the relationship between the Hospital and the Medical Staff are all to portions of the appendix appearing before that page.

18. Despite the existence of these regulations and the JCAH accreditation standards, the legal, administrative and economic relations between hospitals and their medical staffs varies a great deal among

rials. However, defendants did not show that they were subject to the federal and state regulations to which they point, let alone demonstrate that they complied with those regulations. Petitioner did not even prove that York Hospital was accredited by JCAH, let alone show its standards or compliance with them. And the pretrial materials on which Petitioner relies were so thoroughly impeached that defendants did not proffer them at trial.

Repeatedly, this Court has admonished that it will not consider "facts" which are not of record.[19] Regardless of what petitioner might have shown in the abstract and regardless of what allocation of responsibilities should or might exist at some hypothetical hospital, what *this* trial record shows, without contradiction, is that *this* Hospital Board delegated all decision making responsibility for determining both the criteria for granting staff privileges and compliance with those criteria to the Petitioner-Medical Staff. Evidence, including the minutes of the Board of Directors, shows that the only responsibility the Board retained and exercised with regard to staff privileges was determining whether the staff had followed the hearing procedures established by Petitioner itself in its own Bylaws. (1690a; 1693a; 3821a; 4150a-4152a; 4501a-4502a; 4777a-4780a). Indeed, the Hospital's Vice-President for Medical Affairs was constrained to admit that the Hospital Board simply served as a rubber stamp for decisions by the Medical Staff committees concerning staff privileges:

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hospitals depending on the hospitals' legal structure, market power, and administrative philosophy. See, M. Roemer and J. Friedman, *Directors in Hospitals: Medical Staff Organization and Hospital Performance* (1971); Kissam & Webber, *supra*, 70 *Calif. L. Rev.* at 605 (1982). The commentators who have reviewed the way in which privileges are awarded under the JCAH accreditation standards have concluded that the medical staff is the significant entity of the process and, therefore, staff privilege decisions which further the economic interests of the medical staff should be considered the product of a physician cartel. Kissam & Weber, *supra*, 70 *Calif. L. Rev.* at 606-613, 639-40; Dolan and Ralston, *supra*, 18 *Houston L. Rev.* at 712.

19. *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972); *New Haven Inclusion Cases*, 399 U.S. 392, 450 (1970); *Lawn v. United States*, 355 U.S. 339, 354 (1958).

"A. The Board of Directors at York Hospital operates by committees and the endorsement by the Medical Staff Committee virtually amounts to an endorsement by the Board. (3821a)

Specifically, with regard to the issue of osteopathic physicians gaining access to the use of York Hospital's facilities, the record shows that the Hospital and the M.D.s on its Medical Staff did not have an identity of interest. Instead, their interests were diametrically opposed. There was no question that osteopaths were well qualified as a group. Thus, as plaintiffs' economist testified, permitting D.O.s to practice at York Hospital would only serve to maximize demand for hospital services and therefore benefit the Hospital. See: 3871a-3872a. Presumably, it was for this reason that the Hospital changed its Charter in 1974 to permit D.O.s to join the staff. The uncontradicted economic testimony also shows, however, that opening the staff to osteopaths would create additional competition for the existing M.D. staff, reducing the demand for their services, and would, therefore, be contrary to their economic interests. See: 3877a. The evidence is also without contradiction that the hospital completely capitulated to the contrary interests of the medical staff in this regard. Although the Hospital determined in 1974 to amend its Charter to permit the admission of osteopathic physicians, the Hospital's President explained that:

"The Board of Directors in enacting the change of the charter felt that it was very important that a change of the charter would not indicate to the Staff that they had to make a change in the bylaws [which barred D.O.s from its Staff] but that it is something the Medical Staff themselves should evaluate and make a decision." (4502a)

Thus, the Board expressly delegated to the Medical Staff final authority to exclude osteopathic physicians from the Hospital in furtherance of their own economic interests, contrary to the financial interests of the Hospital.

Accordingly, support for the alternative factual assertions that the members of the Medical Staff and the Hospital had or were "required" to have the same interests with

regard to the admission of osteopathic physicians or that the Hospital alone was the "decision maker" with regard to staff privileges is not only absent from but contradicted by the trial record. In the absence of the factual basis for the application of the legal principles urged by Petitioner, the grant of certiorari would be an empty gesture.

D.

With regard to Petitioner's claim that the Court of Appeals was "wrong" in holding that the Medical Staff was a combination, the Petitioner's legal position is somewhat muddy. It appears to be the Petitioner's claim that despite the fact that the members of the staff are otherwise independent entities, the fact that they are "required" to act as agents for the benefit of the Hospital in making staff access decisions renders them one single entity incapable of conspiring with respect to such decisions. The only appellate support tendered for this proposition is this Court's decision in *Copperweld Corp. v. Independence Tube Corp.* (hereinafter "*Copperweld*"), 104 S. Ct. 2731 (1984), in which this Court held that a parent and a subsidiary corporation were not economically distinct and therefore were incapable of forming a Sherman Act conspiracy.

Before this Court's decision in *Copperweld*, the Intra-enterprise Conspiracy Doctrine permitted a conspiracy to be defined as including legally distinct entities who were part of a single firm such as a parent and a wholly owned subsidiary. See, *e.g.*, *Kieffer-Stewart Company v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951). In *Copperweld*, this Court rejected an approach to the Sherman Act which depended on formal legal distinctions. In enacting Section 1 of the Sherman Act, the Court reasoned, Congress was concerned with distinguishing between single firm and multi-firm conduct in economic terms. *Copperweld*, 104 S. Ct. at 2740-41. Accordingly, for purposes of ascertaining plurality of action under Section 1, the legal relationship between the parties was irrelevant. What was important was whether they were "separate economic actors." *Id.* at 2741 & 2742.

Agency, the relationship wherein there is a manifestation of mutual assent for one to act for the benefit of another is, like the relationship betwen a parent and a subsidiary, a legal conceptualization not an economic one. Thus, under the teaching of *Copperweld*, it should be irrelevant to the process of ascertaining plurality of action under Section 1. This was the precise import of the Court's ruling in *American Association of Mechanical Engineers v. Hydrolevel Corp.*, (hereinafter "*Hydrolevel*"), 102 S. Ct. 1935 (1982). There the Court considered whether the action of an "agent" of a trade association of otherwise independent entities, who was also an officer of one of the entities, sufficed to impose liability on the association ("ASME") under Section 1. The Court ruled that:

> "Whether they intended to benefit ASME or not, ASME's agents exercise economic power because they act with the force of the Society's reputation behind them. And, whether they act in part to benefit ASME or solely to benefit themselves or their employers, ASME's agents can have the same anticompetitive effects on the marketplace. The anticompetitive practices of ASME's agents are repugnant to the antitrust laws even if the agents act without any intent to aid ASME, and ASME should be encouraged to eliminate the anticompetitive practices of all of its agents acting with apparent authority, especially those who use their positions in ASME solely for their own benefit or the benefit of their employers." *Id.* at 1946.

Thus, under this Court's conspiracy cases the test for determining whether members of an organization are independent entities for purposes of the Sherman Act is not the subjective inquiry determinative of agency — for whose benefit a particular action is taken.[20] Rather, it looks to the traditional objective indicia of economic independence:

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20. *Hydrolevel; United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972); *United States v. Sealy*, 388 U.S. 350, 353-54 (1967); *Silver v. New York Stock Exchange*, 377 U.S. 341, 347-48 (1963); *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476, 481 (4th Cir. 1980) *cited with approval in Blue Shield of Virginia v. McCready*, 102 S.Ct. 2540, 2543 n. 4 (1982).

"whether persons pool their capital and share the risks of loss as well as the opportunities for profit."[21] Where they do not do so but separately pursue the opportunity for profit they are considered independent economic entities.[22] Where an organization, however legally established, is composed of such independent economic entities, then the organization is deemed to be a combination among its members within the ken of Section 1.[23]

Here, the Circuit Court applied these principles to the undisputed facts. Faithful to the principles of *Copperweld*, it looked beyond the form of the legal relationship among the members of the Medical Staff and the Hospital to the economic reality of the arrangement. It found that the members of the Medical Staff were "independent practitioners" who separately treated and charged patients without pooling their capital and sharing the risks of loss as well as the opportunity for profit and was required to conclude that "the York Medical Staff is a group of doctors, each of whom is a independent economic entity in competition with other doctors in the York medical community." See: PA 58-59. Refraining from any analysis of who was benefitted or intended to be benefitted by the Staff's activities, as it was required to do, the Court likewise had no choice but to conclude that this admitted association of economically independent units was a Sherman Act combination as a matter of law. All of the commentators and the few appellate decisions which have considered the issue have concluded likewise.[24]

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21. *Arizona v. Maricopa County Medical Society*, 102 S.Ct. 2466, 2479-80 (1982). *Accord, e.g., United States v. Sealy, supra*, 388 U.S. at 353-54; *Simpson v. Union Oil Company*, 379 U.S. 13, 15 (1946); *Virginia Academy of Clinical Psychologists of Blue Shield of Virginia, supra*, 624 F.2d at 481; *Associated Press Company v. United States*, 326 U.S. 1 (1943).

22. *Ibid.*

23. *Ibid.*

24. *See, American Medical Association v. United States*, 317 U.S. 144 (1970); Kissam & Webber, *supra*, 70 *Calif. L. Rev.* at 606-11, 638-39, 606-11 (1982); Dolan & Ralston, *supra*, *18 Houston L. Rev.* at 712 & 742 n. 136. *See also, Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479 (7th Cir. 1984); *Health Care Plan of*

Petitioner weakly argues this Court's conspiracy cases should not be applied here because the Medical Staff is organized to advance a common interest, to achieve socially beneficial purposes which cannot be accomplished except through concerted action and that the existence of the staff is required and regulated by law. However, commonality of interest exists in every cartel. What *Copperweld* and the other decisions of this Court teach is that Congress intended the concept of "combination" to distinguish, in an economic sense, between single firm and multi-firm conduct. The purpose of an organization and the law governing its formation and existence are simply not germane to this economic inquiry. Thus, in *Silver v. New York Stock Exchange*, (hereinafter "*Silver*"), 377 U.S. 341 (1963) and *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia* (hereinafter "Virginia Academy"), 624 F.2d 476 (4th Cir. 1980), the fact that defendants were organized as mandated by law did not preclude analysis of the economic effect of the resulting combination under Section 1 of the Sherman Act because the members of the alleged combinations maintained their economic identities. And in *Silver*, *Virginia Academy*, and *Hydrolevel*, as well as in *NCAA v. Board of Regents of the University of Oklahoma* (hereinafter "NCAA"), 104 S.Ct. 2948 (1984), *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), and *Associated Press v. United States*, *supra*, the fact that the defendant-Associations could only achieve socially beneficial purposes through concerted action did not alter the fact that the independent economic identity of their members rendered the activities of each subject to analysis under Section 1 as a matter of law.[25]

New Jersey v. West Jersey Hospital, [1982-1983] Trade Cases (CCH) ¶65,067 (D.N.J.); *Addino v. Genes, Valley Medical Care, Inc.*, [1984] Trade Cases (CCH) ¶66,289 (W.D.N.Y.); *Hoffman v. Delta Dental Plan of Minnesota*, 517 F. Supp. 564 (D. Minn. 1981).

25. Questions concerning the purposes of an organization and whether it is required and regulated by law, while not material in the determination of plurality of action are, of course, central to other antitrust issues — whether the combination restrains trade or is immune from Sherman Act liability under the state action doctrine enunciated in *Parker v. Brown*, 317 U.S. 341 (1943). However, if these questions

Insofar as the conspiracy question is concerned, the most we have here is an application by the Court of Appeals of clear principles of law recently articulated by this Court to facts which are virtually undisputed without any conflict among the circuits or any cogent argument for a change in the law. That simply does not warrant review by this Court.

E.

Petitioner attempts to bring this case within the considerations which prompted the grant of certiorari in *Northwest Wholesale Stationers v. Pacific Stationery & Printing Company*, October Term, 1983, No. 1368, by asserting that in assessing the reasonableness of the restraint created by petitioner's conduct, the Circuit Court erred by creating a "new per se rule" and applying it without "minimum" analysis of the purpose and economic effect of the alleged restraint. Yet, examination of the record and judicial opinions in this case render any analogy to *Northwest Wholesale Stationers* facile and disingenuous.

Among the categories of conduct which this Court has long considered as "naked restraints" in violation of the Sherman Act are group boycotts which, for purposes of the per se rule, may be defined as a concerted attempt by a group of competitors at one level of distribution to insulate themselves from competition from non-group members by depriving them of a trade relationship which they need in order to compete at the level of competition at which the group competes.[26] Petitioner does not contend otherwise. However, Petitioner asserts that a boycott is not actionable under the per se rule absent proof of coercion. See *Petition* at p. 23. Petitioner offers no support for this proposition and none can be found.

NOTES *(Continued)*

are to be considered, they should be considered in connection with such issues only.

26. *E.g., United States v. General Motors Corp.*, 384 U.S. 127 (1966); *M & H Tire Company v. Hoosier Racing Tire Corp.*, 733 F.2d 973, 980 (3d Cir. 1984); *Kreuzier v. American Academy of Periodontology*, 735 F.2d 1479, 1493 (D.C. Cir. 1984); L. Sullivan, *Antitrust* 230, 232, 244 (1977).

As the Third Circuit here ruled "a boycott is not illegal under the antitrust laws because of opposition to the use of coercion." (PA-68-69). Rather, the per se ban reflects the concern of the antitrust laws with the effect of such behavior on competition. By depriving competitors of goods and services which are necessary to effectively compete, the group inducing a refusal to deal prevents or impedes competition with the members of the group. This reduces supply or "output" relative to demand thereby threatening an artificial increase in costs and diminution in quality.[27] Thus, there are a plethora of decisions by this Court, ignored by Petitioner, which find per se illegality when a group of competitors at one level of distribution uses its relationship with a supplier of competitively important goods or services to prevent access by competitors of the group to such goods and services without proof of coercion, intimidation, or threats of boycotts against the supplier.[28]

In this case, access to York Hospital's facilities was essential to any physician seeking to compete in supplying in-patient care in the York MSA. When the combination of allopathic physicians represented by Petitioner acted to prevent their competitors, the osteopathic physicians, from obtaining access to these competitively important facilities, they plainly engaged in a classic boycott. Thus, the Court of Appeals was undoubtedly correct in concluding that in the absence of some counterveiling competitive consider-

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27. *E.g., Kreuzer v. American Academy of Periodontology, supra,* 735 F.2d at 1493-94; *Marese v. American Academy of Orthopedic Surgeons,* 706 F.2d 1488, 1495-96 (7th Cir. 1983); L. Sullivan, *Antitrust* §85 (1977); Dolan & Ralston, *supra,* 18 *Houston L. Rev.* at 716-17 (1982). *See also: NCAA v. Board of Regents of the University of Oklahoma,* 104 S.Ct. 2948 (1984).

28. *United States v. General Motors Corp.,* 384 U.S. 127 (1966); *Radiant Burners v. Peoples Gas, Light & Coke Company,* 364 U.S. 656 (1961); *Associated Press Company v. United States,* 326 U.S. 1 (1945); *American Medical Association v. United States,* 317 U.S. 519 (1943); *United States v. Terminal Railroad Association,* 224 U.S. 383 (1912); *American Accord, e.g., Wilk v. American Medical Association,* 719 F.2d 207, 230 (7th Cir. 1983).

ation, Petitioner's conduct was a restraint of trade under a per se rule which is almost as old as the Sherman Act itself.[29]

Plainly, a Court reviewing a staff privilege policy under the antitrust laws would be wrong if it is stopped here and failed to consider any justification offered for the boycott, but that does not mean that a full blown rule of reason analysis is required either. This Court has recognized that there may be factors implicit in the public service aspect of the professions, efforts at industry self-regulation, or the peculiarities of certain forms of collusion which render pro-competitive conduct which might otherwise be considered a naked restraint under the per se rule.[30] These cases teach that consideration should be given to such pro-competitive factors, but at the same time recognize that the 90 year experience of the judiciary which nourished the creation of per se rules in the first instance is not to be jettisoned either. What the cases hold is that where there is conduct which fits the description of a per se violation, such as a group boycott, the defendants may assert that because of the public service aspects of the business or otherwise, their conduct actually regulated and thereby promoted competition. When such pro-competitive justification is proffered, the Court is required to withhold consideration under the per se rule and to "facially" balance the presumed anticompetitive effects of the practice against the

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29. The Third Circuit concluded that "the facts of this case do not precisely fit into the mold of a classic refusal to deal" because the hospital did admit some D.O.s and "arguably then what is at issue is not a boycott but mere discrimination which sounds less like a per se antitrust violation." (PA-69) However, the Court concluded, "we are satisfied that the restrictive policy is, in purpose and effect, sufficiently close to the traditional boycott that the characterization is appropriate." (PA-70) The cases generally sustain the notion that a refusal to deal on equal terms — discrimination — is by its purpose and effect equivalent to a group boycott. *See, Klor's Inc. v. Broadway Hill Stores, Inc.*, 359 U.S. 207, 212-12 (1959); *W.W. Montague & Company v. Lowery*, 193 U.S. 38 (1904); *St. Bernard General Hospital v. Hospital Service Association*, 712 F.2d 978, 987 (5th Cir. 1983).

30. *E.g., Arizona v. Maricopa County Medical Society*, 421 U.S. 773, 788 n. 19 (1975); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978).

positive competitive effects, if any, without engaging in any detailed market analysis.[31] As the Court said in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, (hereinafter "*Broadcast Music*") 441 U.S. 1, 16 n. 33:

> "The scrutiny occasionally required must not merely subsume the burdensome analysis required under the rule of reason, *see, National Society of Professional Engineers v. United States*, 435 U.S. 679, 690-92 (1978) or else we should apply the rule of reason from the start."

If the justification remains factually unproven, is not based on pro-competitive effects or does not facially outweigh the anticompetitive effect, the restraint is branded unreasonable as a "naked restraint"; otherwise, the rule of reason is brought to bear.[32]

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31. *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma*, 104 S. Ct. 2948, 2963-64, 2965, 2967 (1984); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 16, 19-20 (1979); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692-696 (1978); *Silver v. New York Stock Exchange*, 373 U.S. 341, 347-48 (1963); *American Medical Association v. United States*, 317 U.S. 519, 531 (1943); *Kreuzier v. American Academy of Periodontology*, 735 F. 2d 1479 (D.C. Cir. 1984); *St. Bernard Hospital v. Hospital Service Association*, 712 F.2d 978 (5th Cir. 1983); *United States v. Realty Multilist, Inc.*, 629 F. 2d 1351 (5th Cir. 1980); *Virginia Academy of Clinical Psychologists v. Blue Shield*, 624 F. 2d 476, 485 (4th Cir. 1980).

32. See cases cited at footnote 31, *supra*.

Lower courts and commentators have variously described these cases as using a "per se rule", a "modified per se rule", an "abbreviated" or "truncated" rule of reason analysis, a "modified" rule of reason approach, a rule of "facial unreasonableness", and simply a "rule of reason." See, *e.g.*, Dolan & Ralston, *supra*, 18 *Houston L. Rev.* at 741; Havinghurst, *supra*, 1978 *Duke L.J.* at 348 n. 194; Kissam, *Antitrust Law, The First Amendment, and Professional Self-Regulation, Regulating the Professions*, 143 (R. Blair & S. Rubin, eds. 1980); Sullivan & Wiley, "Recent Antitrust Developments", 27 U.C.L.A. L. Rev. 265, 323 (1972). These differences in labelling are attributable to the fact that both per se rules and the rule of reason form part of a continuum which measures the same thing and that these cases fall in that space between the two where there is "no bright line" of separation. *National Collegiate Athletic Assocation v. Board of Regents of University of Oklahoma, supra*, 104 S. Ct. at 2942 n. 26 and 2965; *National Society of Professional Engineers v. United States, supra*, 435 U.S. at 692.

Here, the Court of Appeals simply applied these principles in a fashion which was more than indulgent to defendants. It clearly stated that it would "utilize a rule of reason balancing approach" rather than a per se approach, if defendants offered any "legitimate explanation for their discrimination." (PA-70). However, the Court could not even reach the threshhold issue of whether to withhold per se treatment because the defendants did not seek to offer such justification. As the Court observed "their defense at trial was that they did not discriminate against D.O.s." (PA-70) "Since the jury believed otherwise," (PA-73), the Court had no choice but to conclude "that a per se rule should be applied, since the effect of the practice is identical to that of the traditional boycott, and plainly anticompetitive." (PA-70).

Petitioner seeks to escape the force of this conclusion through two routes. First, petitioner asserts that there are "significant economic distinctions" peculiar to the health care industry which reduce the level of competition below that found in other industries. This, petitioner claims, somehow warrants application of a rule of reason standard to judge the effects of its boycott against osteopathic physicians. Petitioner fails to cite any support for this proposition and none can be found. All of the cases, *Silver*, *Broadcast Music*, *Professional Engineers*, and *NCAA*, expressly reject the use of extensive industry analysis as a rationale for non-application of rules against naked restraints.[33] Moreover, in *Arizona v. Maricopa County Medical Society*, 102 S.Ct. 2466, 2475-78 & 2479, and in *Jefferson Parish Hospital District No. 2 v. Hyatt*, 104 S.Ct. 1551, 1566-67 (1984), this Court expressly disavowed the notion that the factors cited by defendant — pervasive third party reimbursement, extensive government regulation, and poor consumer information — warranted distinguishing the health care industry from other industries for pur-

NOTES *(Continued)*

While there may be some differences in what to call the analysis, however, what is important is that the rule applied is consistently the same. L. Sullivan, *Handbook of the Law of Antitrust*, §88 at (1977); Leibeloft and Pollard, *supra*, 34 *Vanderbilt L. Rev.* at 945-47 (1981).

33. See Footnote 31 and accompanying text, *supra*.

poses of antitrust analysis. But perhaps most importantly, petitioner offers no economic explanation for why an overall lack of competition in the market justifies a reduction in the level of scrutiny to be applied to assess anticompetitive behavior in the industry. Just the opposite would seem to be true.

Ultimately, then, in order to escape the conclusion that its anticompetitive boycott was a naked restraint under the decisional paradigm consistently applied by this Court, petitioner is forced to claim that Judge Becker misrepresented the record when he found that defendants failed to offer any justification for their policy of discrimination. Plainly, it is inappropriate to request the issuance of a writ of certiorari on the ground that an experienced panel of circuit judges in writing a 96 page opinion overlooked or misrepresented such an essential fact.[34] It is also inaccurate.

In both the district court and the court of appeals, defendants did not seek to justify the discriminatory policy adopted with respect to the credentialling of osteopathic physicians. Rather, each of the ten representatives of the Medical Staff who took the stand at trial stallwartly denied the existence of any discrimination between D.O.s and M.D.s.[35] That tactic having failed below, they rely on one passage of Dr. Bacastow's testimony to support the assertion here, for the first time, that the application of more stringent standards of competence and integrity to osteopathic physicians was necessary because of the Petitioner's "unfamiliarity" with their training, background and references. See *Petition* at p. 5. This newly proffered justification is false, misleading and irrational.

Dr. Bacastow testified unequivocally that he was familiar with the training and background of D.O.s and that there was no difference between them. (3806a) Both the Hospital and the Medical Staff thoroughly studied the training and educational regimen for osteopathic physicians

34. See, *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma* 104 S.Ct. 2948, 2959 (1984); *Branti v. Finckel*, 445 U.S. 507, 512 n.6.

35. See: 4636a-4637a; 4639a-4641a; 4749a; 4773a-4774a; 4835a-4836a; 4843a; 4853a; 4868a; 4879a; 4962a; 4990a-4997a.

and concluded likewise. (4025a) And because osteopaths were required to refer their patients to the M.D.s at York Hospital, those M.D.s were certainly familiar with the osteopathic physicians in the county who would serve as sources of referral information. (5260a-5261a) Finally, the justification now offered by the Medical Staff might warrant a more searching application of uniform standards of competence to the applications of osteopathic physicians, but it makes no sense as a rationale for imposing completely different criteria of acceptability on them as Petitioner did.[36]

Thus, petitioner can point to no deviation from clearly articulated decisions of this Court or the creation of an intercircuit conflict as the basis for granting a writ of certiorari on the per se rule reason "issue." Its sole basis for requesting certiorari — that the Court of Appeals "overlooked" market structure and procompetitive justification —is not only an inappropriate basis for granting the writ but it is, like the issue itself, simply a myth created by a party who lost a factual dispute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

MICHAEL D. FISHBEIN
Attorney For Respondent

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36. Petitioner also claims that the Third Circuit relegated its claims regarding Dr. Weiss' professional competence and character for consideration only during the damage phase of the bifurcated trial. This claim is also false. Defendants offered evidence concerning Dr. Weiss' competence and character during the liability phase of trial to prove that Weiss was excluded from the Staff because of his allegedly poor qualifications and not because of discrimination against osteopaths. None of this evidence was excluded. However, the jury did not credit it, expressly finding that Weiss "would have been granted staff privileges at York Hospital but for the fact that he was an osteopathic physician rather than an allopathic physician" and that his exclusion from the Staff was the result of a conspiracy to deny staff privileges to osteopathic physicians. See: PA-99.

APPENDIX

BEST AVAILABLE COPY

A-1

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 82-3507, 82-3580, 82-3581

MALCOLM WEISS,
Plaintiff, Appellant in No. 82-3581

v.

YORK HOSPITAL, et al.,
Defendants, Appellants in Nos. 82-3507, 82-3580

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLANTS YORK HOSPITAL, MEDICAL AND DENTAL STAFF OF YORK HOSPITAL, THOMAS L. BAUER, IVAN L. BUTLER, SAMUEL W. DEISHER, AND LOIS N. KUSHNER

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STATEMENT OF SUBJECT MATTER JURISDICTION

The Court has subject matter jurisdiction of these consolidated appeals as follows. In No. 82-3507, appeal was taken from the entry of an injunction before final judgment in the court below so that subject matter jurisdiction is appropriate pursuant to 28 U.S.C. §1292(a)(1). In No. 82-3580, appeal was taken from entry of a judgment certified by the court below as final upon a proper determination by the district court that there is no just reason for delay and upon that court's express direction for the entry of judgment under F.R.Civ.P.54(b). Jurisdiction in that appeal is provided by 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

1. Did the district court err in certifying a plaintiff class of 92 osteopathic physicians in a refusal to deal antitrust case concerning the denial of hospital staff privileges where:

(a) only one such physician, the named plaintiff, made a demand which was rejected for staff privileges;

(b) seven other such physicians made applications for staff privileges, six of which have been granted and the remaining one was pending;

(c) all such physicians are located in one county and can be identified with minimal effort;

(d) each such physician, under applicable law, must individually demonstrate his or her qualifications to obtain staff privileges;

(e) the complained of conduct allegedly caused the named plaintiff to be rejected for staff privileges while such conduct allegedly caused the class to be dissuaded from applying for staff privileges: and

(f) the plaintiff competes for staff privileges with all members of the plaintiff class?

2. Did the district court err in holding York Hospital (the "Hospital" or "York") and its Medical Staff (the "Staff") liable to the plaintiff class under the antitrust laws for refusal to grant staff privileges where no class member, other than the plaintiff, has ever made a demand for staff privileges at that hospital?

3. Did plaintiff and the class fail to demonstrate injury in fact under the antitrust laws where there was no showing of lost patients, income, or profits or any other cognizable economic harm by reason of the fact each was not a member of the Staff?

4. Was it error to hold the Staff liable to the class under §1 of the Sherman Act for conspiring to exclude osteopaths from staff privileges where:

(a) the Staff, as required by law, is a division of the Hospital which was found by the jury not to have conspired;

(b) the jury found that no other defendant conspired to exclude osteopathic physicians from Hospital staff privileges; and

(c) there is no evidence that a third party so conspired with the Staff?

5. Was it error to conclude that the relevant product market in a Sherman Act case is "inpatient hospital health care services supplied by hospitals and their medical staffs" where:

(a) such services range, for example, from open heart surgery to child birth and include many other recognized specialties; and

(b) there was no evidence of cross-elasticity of supply or demand among such varied services?

6. Under §2 of the Sherman Act, was it error to hold York liable to a physician and class who are not in competition with the hospital?

7. Was it error to hold York liable to the plaintiff and class for monopolization, attempting to monopolize, and for conspiring to monopolize the relevant product market, where there was no showing:

(a) that the Hospital can control prices since substantially all charges for hospital care are paid by and based on agreements with third parties;

(b) that the Hospital can exclude competition such as other hospitals from the relevant product market;

(c) that the Hospital wilfully acquired or maintained any power to so control or exclude?

(d) that the Hospital had a specific intent to monopolize, or engaged in any conduct to achieve a monopolization of, or had a dangerous probability of achieving a monopoly in such market; and

(e) that a third party so conspired with the Hospital, and the jury found that no other defendants so conspired?

8. Did the plaintiff and class fail to establish antitrust jurisdiction where there was no evidence that the alleged violations affected the interstate commerce of the plaintiff or any class member?

9. Were all defendants entitled to summary judgment and a directed verdict and judgment n.o.v. in their favor:

(a) where as to the class' claim, there was no dispute that no class member had applied for but had been denied Hospital staff privileges; and

(b) where as to the plaintiff's claim, there was no evidence to dispute the affidavits denying wrongdoing?

10. Did the district court err or abuse its discretion in enjoining York and the Staff where:

(a) there was no violation of the antitrust laws;

(b) the plaintiff and the class have an adequate remedy at law;

(c) the terms of the injunction on its face are vague, contradictory, and in patent violation of state law; and

(d) the injunction imposed a standard of medical expertise without any record evidence of the meaning or appropriateness of the standard?

11. Was it error to hold York and four physicians

who, as committee members, reviewed plaintiff's application for staff privileges, liable to plaintiff for intentional interference with existing contractual relations where plaintiff never:

(a) identified a single contract or patient relationship which was disrupted:

(b) showed any such contract or relationship was disrupted because of the denial of his application;

(c) showed that such disruption, if any, was intended by the defendants; and

(d) showed any resulting actual loss?

12. Did the district court err or abuse its discretion in failing to conduct the trial in the Harrisburg Division where the suit was filed and all of the parties and non-expert witnesses, but none of the jurors, resided?

STATEMENT OF THE CASE

I. Nature of the Case.

On February 6, 1980, plaintiff Malcolm Weiss ("Weiss"), a doctor of osteopathy, filed this action in the United States District Court for the Middle District of Pennsylvania at Harrisburg. The Complaint named York Hospital and the York Hospital Medical and Dental Staff as defendants. Weiss alleged that his application for Staff privileges at the Hospital was denied because of: a concerted refusal to deal with him and all other osteopathic physicians[1] located in and around York, Pennsylvania, in violation of Section 1 of the Sherman Act, 15 U.S.C. §1; monopolization, attempted monopolization, and conspiracy to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C. §2; and violation of Pennsylvania antitrust and common law. 51a-58a.

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1. The distinction between osteopathic physicians (D.O.'s) and allopathic physicians (M.D.'s) is described by the Court in *DeMasi v. Weiss*, 669 F.2d 114, 116 nn. 1, 2 (3d Cir. 1982) ("*DeMasi*").

After the district court granted the motion of the Hospital and Staff to dismiss (137a-153a), Weiss filed a First Amended Complaint on June 2, 1980. In this complaint, as further amended, he named ten additional defendants, the five physicians who in their capacity as members of the Staff's Medical Executive Committee voted on his application for privileges, and the five physicians who constituted the Judicial Review Committee specially impanelled at the Hospital to review, at Weiss' request, the recommendation by the Medical Executive Committee that his application be turned down. The alleged relevant geographic market coincided with the York Medical Service Area ("MSA"), a health care planning area designated by the eight county regional health systems agency ("HSA"). 185a-203a; 582a.

On May 28, 1981, following a two day hearing, the trial court granted plaintiff's motion for class action certification, determining that the action could be maintained under F.R.Civ.P. 23(b)(2) on behalf of a class of all osteopathic physicians practicing medicine in the York MSA. 1505a-1526a.

On September 25, 1981, the district court denied the motion by all defendants for summary judgment. 2238a-2247a. The court's opinion is reported as *Weiss v. York Hospital*, 524 F.Supp. 433 (M.D.Pa. 1981).

On January 8, 1982, this Court rendered its decision in two consolidated proceedings for writs of mandamus and prohibition related to this case. In one matter, No. 81-2192, the Court denied the petition directed to the district court's certification of the plaintiff class, holding that mandamus and prohibition were not available in the circumstances of the case to review the trial court's action. In the other matter, No. 81-2171, the Court expressed serious doubts about a discovery order issued by the district court directing approximately 100 allopathic physicians to disclose confidential income data. The Court denied the petition at that time but retained — and still retains — jurisdiction in the matter until completion of the liability phase of the bifurcated trial in the

district court. The opinion in both matters is reported as *DeMasi*.

Thereafter, defendants filed a motion to decertify the class (2592a-2609a), which motion was denied on August 18, 1982. 3225a-3230a.

On September 30, 1982, following a three week jury trial on liability and a one day hearing on equitable relief, the district court entered its opinion, order, and judgment. 6327a-6341a. These are reported as *Weiss v. York Hospital*, 548 F.Supp. 1048 (M.D.Pa. 1982).[2] In this opinion, the court entered findings of fact based upon the jury's answers to over 40 special verdict questions[3] and other evidence received in connection with plaintiff's application for injunctive relief. The court also entered conclusions of law determining that:

> 1. On the §1 claim, the Staff (but not the Hospital) is liable to the plaintiff class but not to Weiss;
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> 2. On the §2 claims, the Hospital (but not the Staff) is liable to both Weiss and the class for monopolization, attempted monopolization, and conspiracy to monopolize;
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> 3. On the pendent state law claims, the Hospital (but not the Staff) and four physicians are liable to Weiss but not the class for interference with contractual relations, and
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> 4. The remaining six physician defendants are not liable to anyone for anything.

6339a-6340a, 548 F.Supp. at 1060-61.

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2. This opinion is so frequently cited herein in parallel to the joint appendix cite that only the volume and page of F.Supp. are employed. *E.g.*, "548 F.Supp. at 1053."

3. All jury trials conducted by the district judge employ the special verdict procedure. 81a.

The following is a chart presentation of the court's ruling:

DEFENDANTS Including Specialty & Position	§1 Sherman Act (Class)	§2 Sherman Act (Class Monop	Attempt	Consp)	State Law Not Class
York Hospital	—	W + C	W + C	W + C	W
York Hospital Medical Staff	C	—	—	—	—
Ardison Family Practice—MEC	—	—	—	—	—
Bauer Surgeon—MEC	—	—	—	—	W
Butler Neurosurgeon—MEC	—	—	—	—	W
Deisher OB-GYN-JRC*	—	—	—	—	W
Kline Internist—MEC	—	—	—	—	—
Kushner Radiologist—MEC*	—	—	—	—	W
Laucks Psychiatrist—JRC	—	—	—	—	—
MacDougall Family Practice—JRC	—	—	—	—	—
MacKenzie Internist—JRC	—	—	—	—	—
Whiteley Pathologist—JRC	—	—	—	—	—

W = Liable to named plaintiff
C = Liable to class
— = Exonerated
JRC = Judicial Review Committee
MEC = Medical Executive Committee
* = Chaired Committee

Based on this determination, the court entered an order pursuant to §16 of the Clayton Act, 15 U.S.C. §26, enjoining the Hospital and the Staff from:

> 1. undertaking any act against Weiss or the class "which would in any way impede or deny the Plaintiffs full, reasonable, fair, or equal access to the facilities of York Hospital and full, reasonable, fair or equal access to staff privileges at York Hospital";
> 2. applying standards of review of applications from osteopathic physicians different from the standards applied to similar applications from allopathic physicians, and

3. interpreting the expression "American Board of Medical Specialty" in the Staff by-laws to exclude osteopathic boards of specialty.

6340a, 548 F.Supp. at 1061.

On October 28, 1982, the Hospital and the Staff appealed from this injunctive order. 6349a. That appeal is No. 82-3507.

Pursuant to the September 30, 1982, decision, and consistent with its conclusions of law, the district court entered a Judgment on Special Verdict. 6341a, 548 F.Supp. at 1062. That judgment was later, on November 18, 1982, determined by the district court to be final pursuant to F.R.Civ.P. 54(b). The court expressly determined that there was no just reason for delay in entering final judgment. The court directed the entry of final judgment, which was entered that day. 6351a-6356a.

Thereafter, on December 9, 1982, the Hospital, the Staff, and defendants Bauer, Butler, Deisher, and Kushner filed their notice of appeal, No. 82-3580. 6359a. On December 13, 1982, plaintiff Weiss filed a notice of cross-appeal, No. 82-3581. 6360a.

By Order entered January 31, 1983, this Court consolidated the three appeals, denied Weiss' motion also to consolidate the related pending mandamus proceeding (No. 81-2171), and designated the appealing defendants as appellants for briefing purposes.

II. Statement of Facts.

A. Introduction.

York Hospital is a non-profit community hospital located in York, Pennsylvania. It is governed by a Board of Directors composed of lay leaders from many various aspects of the York community. 4215a; 4454a.

Also located in the York metropolitan area is Memorial Osteopathic Hospital ("MOH"). This is another general hospital located a few miles from York Hospital.

Traditionally, osteopathic and allopathic physicians have been and are separately schooled and licensed by the Commonwealth of Pennsylvania and other states. In

1974, upon recognizing that the traditional differences in the schooling of D.O. and M.D. physicians were no longer substantial, York Hospital voluntarily amended its corporate charter to permit osteopathic physicians to obtain staff privileges. 3806a-3807a; 3810a-3811a. In 1976, after careful study of a number of proposals, the York Staff amended its by-laws to accomplish that result. 3813a-3814a; 4024a-4025a.

The events in this case arise out of the 1976 application for York Hospital staff privileges by plaintiff Weiss, a general (or family) practitioner in private practice in the York area. Before his application was even considered, Weiss threatened that he would sue if the application were rejected. 4876a.

In 1977, it was rejected. After he requested "reactivation" of the application, it was again denied in March, 1979.

The threatened litigation is now before this Court on these consolidated appeals. His claim is that the denial of his application resulted from a discrimination against osteopaths.

The district court found as fact that, since 1976, eight osteopathic physicians have applied for Staff privileges, and six were accepted, while a seventh application is dormant, awaiting supplementation by the physician.

It is undisputed that, *of these eight, only one — Dr. Weiss' — has been rejected*. In fact, on the very same day that Weiss' application was first denied, another osteopath was accepted for staff privileges.

B. Procedures for Application for Staff Privileges.

Consideration of the Weiss application followed the routine procedure at York Hospital for the processing of applications for staff privileges. 1542a-1555a; 4213a.

After the initial background and reference information on an applicant has been gathered, that review proceeds along the following sequence. First, an evaluation of the application must be provided by the chairman of the Hospital department in which the applicant seeks

privileges.[4] In some instances, such as the Family Practice Department, the department chairman selects a departmental credentials committee to assist the chairman in formulating the evaluation. Then, the Staff Credentials Committee reviews the application and related file and formulates its recommendation to the Staff Medical Executive Committee. 3816a-3817a; 5961a. Upon receiving the recommendation of the Staff Credentials Committee, the Medical Executive Committee independently reviews the application and related file in light of the Credentials Committee recommendation. 3817a-3818a; 5961a. The Medical Executive Committee — based on the applicant's education, experience, professional and non-professional moral and ethical character, loyalty, and performance — then formulates its recommendation on the application to the Hospital's Board of Directors. Exhibit ("Exh.") D-12, 5961a.

The Hospital Board of Directors routinely refers the application to its standing Medical Affairs Committee which is composed of representatives of the Hospital administration, the Staff Medical Executive Committee, and the Board of Directors and is chaired by a member of the Board of Directors. 3821a. The Pennsylvania Department of Health specifically mandates that, under certain conditions, decisions on staff privileges *must* be reviewed by such a committee. 28 Pa. Code §§103.4(6), 107.5(b)(5). The Medical Affairs Committee usually recommends a disposition of the application. 3821a.

After consideration by its Medical Affairs Committee, the Board of Directors has complete, plenary authority to decide whether to accept or reject an application; all decisions on the application by the department, the Staff Credentials Committee, the Medical Executive Committee, and the Medical Affairs Committee are merely recommendations. 3811a-3812a. Again, in accor-

4. At York, like any general hospital, a physician is only granted staff privileges in such department or service as his or her qualifications, including specialty, warrant. Based on experience and training, such privileges may require more or less supervision by others in the same department. 3802a-3805a.

dance with state regulations, the actual final decision on the application is made by the Hospital Board of Directors. 28 Pa. Code §107.5(a).

At any stage of the process prior to the ultimate decision by the Board of Directors, the committee considering the application may request of the applicant, the Hospital's Medical Affairs Department, or another committee that additional information be provided.

Either before or after an application is brought to the Hospital Board of Directors, the applicant is informed in writing of any adverse recommendation of the Medical Executive Committee or decision by the Board, as the case may be. 3822a; 5961a. The applicant may, at that point, request and obtain (i) a written statement of the reasons for the recommendation and (ii) the impanelling of a judicial review committee composed of physicians who have had no part in the consideration of the application to that point. The judicial review committee is required to hear testimony and receive other evidence to determine whether the adverse recommendation on the application was in error, unreasonable, arbitrary, or capricious. The applicant is entitled to attend the hearing, to be represented by counsel, to call witnesses and introduce evidence, to cross-examine and impeach witnesses, and otherwise to rebut evidence against him or her. The hearing proceedings are to be stenographically transcribed, but the judicial review committee is not bound by strict rules of evidence. Exh. D-12, 5961a-5965a.

C. The Application of Plaintiff Weiss.

Plaintiff Weiss applied for Staff privileges in the Family Practice Department of York Hospital. His application indicated that he already had staff privileges at MOH. Even before Weiss' application had been considered by any of the York committees, he informed Dr. Bauer, "you know if I don't get accepted, I'm going to sue." 4876a.

At about the same time, Michael Zittle, D.O., another general or family practitioner in private practice, also applied for staff privileges in the same department. 4057a. Weiss and Zittle were the first two osteopathic physicians to apply for staff privileges at York.

In accordance with the procedures outlined above, the chairman of the Family Practice Department on January 17, 1977 recommended acceptance of the Weiss application. 4065a. References thereafter received by the Hospital concerning Dr. Weiss were conflicting. Supportive letters of reference were received from both allopathic and osteopathic physicians. At the same time, information critical of Weiss' medical competence and ability to work with others in a hospital setting was also received from physicians in both disciplines.

Specifically, the Weiss file contained the April 18, 1977 letter of Kenneth F. Woerthwein, M.D., who wrote, in pertinent part, as follows:

> I do not personally know Malcolm Weiss, but some of his patients, particularly those on Public Assistance have since transferred to our office. They complained that he would make diagnoses about their children which did not seem to be founded. True enough, on physical examination, these children did not have any of these physical problems, particularly iron deficiency anemia. They would also complain that he would be very superficial in his examination. Therefore, I would have strong concern regarding his medical abilities and competence.

Exh. P-53, 5911a. The file also contained the March 9, 1977 letter from G. Bradford Myers, M.D. This letter (Exh. P-45, 5923a-5924a) reported upon a confidential conversation Dr. Myers had with an osteopathic physician on the staff of MOH. The letter recounts that the reporting osteopathic physician

> was quite explicit and straightforward in his descriptions of Dr. Weiss. He claims that Dr. Weiss is

known throughout the Memorial Hospital staff as a "rebel" and one can always depend on him to disrupt a discussion or proposal. [The osteopath] reported that Dr. Weiss' practice is "90%" medical assistance patients, most of which whom [sic] are seen at a very fast rate. [He] claims that the majority of referrals . . . are on a symptom basis only, and that the patient has only rarely been examined to confirm or exclude the presence of pathologic conditions. [He] said that Dr. Weiss has a reputation of being interested primarily in making money, "certainly not delivering quality patient care."

A third letter in the Weiss file was from Roy O. Kammer, D.O. His April 16, 1977 letter stated, in pertinent part as follows:

I have known Dr. Malcolm Weiss for four years. He was not popular during his internship and seemed to perform his duties grudgingly.

There was ambivalence concerning his staff membership at Memorial Osteopathic Hospital and it took three meetings and much debate before his acceptance. I, personally, led the fight to grant him membership on the basis that we trained him in a public institution and, if we approved his training, we had no choice but to grant him membership. On this basis, he was approved.

He served as a paid member of the Emergency Room Staff. He related so badly to people of the lower socio-economic class that on occasion he was physically attacked by patients and family members. He demanded police protection or the right to arm himself. The administration felt this lack of rapport was his fault and terminated his contract.

* * *

At the moment, our By-Laws demand that all staff members attend all required meetings and serve on at least one major committee. I cannot con-

> ceive of a busy generalist fulfilling all of his obligations at both institutions unless provisions are made to waive such requirements.

Exh. P-52, 5909a-5910a.

Even the supportive letters in the Weiss file were unpersuasive. For example, Dr. Ivan Butler, a member of the Medical Executive Committee, explained that three letters from MOH administration were neither satisfactory nor helpful to the committee since each was vague, general, and inconclusive. 4617a; 4620a.

With regard to one of those letters Dr. Butler explained why it was "absolutely not" satisfactory:

> This again was an example of the stonewalling effect we were receiving. We wrote to Mr. Hostler who had been administrator of the hospital there for, I believe, twenty-some years, requesting information and in turn, received a letter from a man who had been there one month. It was of no help at all, or very little help.

4620a.

On June 30, 1977 the Hospital Board of Directors considered the recommendations of the Staff Credentials Committee and the Medical Executive Committee and that of its own Medical Affairs Committee. Based on its discussion of these recommendations, the Board of Directors voted to accept Dr. Zittle's application but to deny Weiss' application. 4130a; Finding of Fact 38, 6332a, 548 F.Supp. at 1053. Notice of the action of the Board of Directors on his application was sent to Weiss that same day, June 30, 1977.

On August 19, 1977, following meetings with Hospital officials, Weiss requested that his application be reactivated and hence reconsidered.

After again receiving the favorable recommendation of the Family Practice Department's Credentials Committee on the application, its chairman recommended that the reactivated Weiss application be accepted. 4139a.

In accordance with the York Staff By-Laws and established procedure, the renewed application was again brought to the Credentials Committee of the York Staff. By this time, the Weiss file contained not only the information previously gathered before Weiss' application was denied in June, 1977, but in addition a memorandum from R. J. Herman, M.D. 4136a. The memorandum (Exh. P-76, 5913a), dated November 3, 1977, related as follows:

> Today I talked to Mrs. Mange of the York office of the Pennsylvania Department of Public Assistance. She reported to me that they have a health screening program for the children of Welfare recipients. They have a contract with an organization to provide that health screening and Dr. Weiss is employed by that organization. The York office of DPA has had many complaints from patients about incomplete exams by Dr. Weiss and about his lack of rapport with them. The State Department of Health here in York also has had similar complaints.
>
> There have been no apparent problems with excessive or inappropriate prescriptions.

On February 28, 1978, the Staff Credentials Committee nevertheless voted (3 for, 1 against, 1 absent) to recommend to the Medical Executive Committee that the application be accepted. 4139a.

On March 6, 1978, the Medical Executive Committee voted to recommend to the Hospital Board of Directors that the application again be denied. The vote was 2 in favor of the Weiss application and 3 against. 4139a; Exh. P-90, 5897a.

At this time, the Executive Committee was composed of Drs. Gary Ardison, of the Department of Family Practice; Thomas L. Bauer, of the Department of General Surgery; Ivan L. Butler, of the Department of Neurosurgery; Jack A. Kline, of the Department of Internal Medicine, and Lois N. Kushner, of the Department

of Radiology, who chaired the committee. 4140a. These five physicians were named defendants.[5]

In accordance with the established practice of the Hospital, the recommendation of the Medical Executive Committee was then brought to the Medical Affairs Committee of the Hospital's Board of Directors. 4142a. This committee requested that the members of the Family Practice Department Credentials Committee, the Staff Credentials Committee, and the Staff Medical Executive Committee meet informally to attempt to reach a consensus on the application. The members of those committees then met on March 20, 1978, and informally voted on the Weiss application. The vote was 6 for denial of the application, 5 for acceptance, 1 abstaining, and 2 absent. 4143a.

The Medical Executive Committee then met on April 19, 1978 to re-reconsider Weiss's application and voted to recommend that the Hospital Board of Directors deny the application. The vote this time was 4 against appointment and 1 in favor. 4144a; Exh. P-93, 5901a.

Dr. Butler explained his vote change from favorable to Weiss's application to opposed. He testified:

> The main reason I changed my mind was, as you recall, I polled a number of members of that Family Practice at the joint meeting that we had, and discussed their feelings for voting for Dr. Weiss and was told by them that they were concerned about his personality and were voting for his admission to the hospital because of fear of a lawsuit. That was probably the final determining factor that caused me to change my mind.

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5. Two of these five, Drs. Ardison and Kline, were totally exonerated by the jury and subsequent court judgment below. The remaining three, Drs. Bauer, Butler, and Kushner, were found liable to Dr. Weiss (and not the class) only on a state law claim of interference with contractual relations. Thus, Drs. Bauer, Butler, and Kushner are appellants in No. 82-3580, whereas all five are appellees in No. 82-3581.

4602a.

On April 21, 1978, Merle S. Bacastow, Vice President-Medical Affairs of York Hospital, sent Weiss written notice of the April 19, 1978 recommendation of the Medical Executive Committee. 4145a-4146a. Upon being advised of the decision of the Committee to recommend denial of the application, Weiss requested and received a statement of reasons (Exh. D-10) why the Executive Committee recommended that the application be rejected. Weiss' status as an osteopathic physician rather than an allopathic physician was *not* a reason for the recommendation. Weiss also requested an appeal to a judicial review committee of the Staff, a procedure open to him under the Staff By-laws. 4146a.

A Judicial Review Committee was appointed, consisting of Drs. S. Philip Laucks, of the Department of Psychiatry; Howard H. MacDougall, of the Department of Family Practice; Iain L. MacKenzie, of the Department of Internal Medicine; John P. Whiteley, of the Department of Pathology, and Samuel W. Deisher, of the Department of Obstetrics and Gynecology, who chaired the committee.[6] 4147a. The Committee members had no first-hand knowledge of the Weiss application or the proceedings thereon prior to the impanelling of the Judicial Review Committee. 4752a; 4833a; 4842a; 4987a.

The Judicial Review Committee met on three occasions to take testimony and other evidence to determine, as provided by the York Staff by-laws, whether the recommendation that Weiss' reactivated application be denied "was in error, unreasonable, arbitrary or capricious." At each hearing session of the Judicial Review Committee, Weiss was present and represented by Counsel. 4754a.

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6. These five physicians were named defendants below. The jury and court judgment exonerated all of them on all claims except Dr. Deisher, who was found liable only to Weiss individually (but not the class) on an interference with contractual relations charge. He is an appellant in No. 82-3580, while all five are appellees in No. 82-3581.

As provided in the York Staff by-laws, Dr. Weiss was permitted alone or through counsel to call and examine witnesses, to cross-examine opposing witnesses, to impeach witnesses, and to rebut the evidence presented against him. 4755a-4756a; 4773a; 4987a-4988a. In fact, at the hearings, some of the negative references in Weiss' file quoted above were read aloud for Weiss and his counsel to hear. 4760a-4763a. Weiss then testified at the Committee's hearing after this information was disclosed to him. 4763a-4765a. A stenographic record of the three days of hearings was kept and transcribed. 4753a-4754a; 4988a; Exhs. D-68, D-69, 5984a, 5987a. All of Weiss' procedural rights were carefully spelled out in a two-page list of "Hearing Procedure" (Exh. D-27 5979a-5980a), which was provided to Weiss and his counsel (4775a-4776a). There was no objection raised to these procedures. 4776a.

After hearing the testimony and receiving all other evidence presented at the hearings, the Judicial Review Committee on December 28, 1978 determined unanimously that the position of the Medical Executive Committee against recommending Staff privileges for Weiss was not unreasonable, arbitrary, or capricious. 4152a. The Judicial Review Committee also determined, with one dissent, that the Executive Committee was not in error.

The dissenting member on this one issue, Dr. MacDougall, nevertheless testified that he believed that the president of MOH, Mr. Hostler, in his appearance before the Committee, "was evading the answers because he had not reviewed the record." 4849a. As a result of this apparent evasiveness, it was agreed that Dr. MacDougall, as a representative of the entire Committee, would review Mr. Hostler's file on Weiss. This took place at MOH with both Weiss and his attorney present 4850a. But Dr. MacDougall was not shown the entire file. 4850a. He described the selection process as follows:

> There was an obvious file on the other end of the table around Mr. Hostler, and certain parts of this file

> were taken out and given to Mr. Markowitz [attorney for Weiss]. Mr. Markowitz then passed some of those papers to me to see. Others he did not.[7]

4851a-4852a. This entire procedure was adopted with the agreement of Weiss' counsel. 4785a-4786a.

Thereafter, counsel for Weiss and special counsel for the Hospital submitted to the Board of Directors written briefs supporting and opposing, respectively, the application. The Hospital Board of Directors then held a special meeting at which presentations were made by counsel for Weiss and special counsel for the Hospital. 1690a-1693a.

On March 13, 1979, the Hospital Board of Directors, having reviewed the recommendation of the Medical Executive Committee and the Judicial Review Committee, voted to deny Weiss staff privileges at the Hospital. The vote was 14 in favor, 0 opposed, and 2 abstentions.[8] 1690a-1693a. At trial plaintiff chose not to call any of the directors to testify.

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7. One of the documents disclosed only during trial was a June 17, 1976 memorandum (Exh. D-76, 6006a) contained in Mr. Hostler's file. Attached to the memorandum are reports by several nurses of incidents involving unprofessional conduct by Weiss at MOH. This conduct included loud, threatening, and abusive language directed at nurses in front of hospital visitors (6007a-6008a), screaming and cursing at nurses in front of patients and visitors (6009a), and disregard for patients' needs. One report dated June 16, 1976 states:

> Patients request nurses to deliver messages to Dr. Weiss when he makes his rounds — for example "Please make sure he sees me when he gets here," "I need a stronger pain pill," "Ask him if I may have a sleeping pill order." His reply when messages are delivered to him are always "Ah screw him/her."
>
> [Signature]

6011a. Despite the obvious relevance of this memorandum, particularly in light of Weiss' testimony that he had had no incidents at MOH since 1970 (3501a-3502a; 5169a), the district court precluded the document and its contents even for impeachment purposes. 5171a.

8. Only one of these directors, Director Angelo, is a physician.

In sum, the application came to the Board of Directors having evoked (1) opposing votes among the committees considering it; (2) an informal vote of 6 for denial, 5 for acceptance, and 1 abstention at the joint meeting called for the purpose of attempting to develop a consensus; (3) less than unanimous votes by the Staff Medical Executive Committee, and (4) a dissent in his favor by the family practice member (presumably a competitor of Dr. Weiss) of the Judicial Review Committee.

Each member of the Medical Executive Committee, the Judicial Review Committee, and the Board of Directors gave an affidavit[9] or testimony on both that he or she was not influenced in the various votes by the fact that Weiss was an Osteopath. 1733a-1742a; 4773a; 4835a; 4843a; 4853a; 4868a; 4879a; 4902a; 4990a.

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9. In the opinion denying defendants' motion for summary judgment, the district court reasoned that

> while the summary judgment rule allows for the use of affidavits in order to establish that there is no triable issue of fact, the party submitting the affidavits must also establish that the affidavits are true.

2242a, 524 F.Supp at 437.

ARGUMENT

I. *LAWLOR* AND *MAZUS* REQUIRE A DEMAND OR APPLICATION FOR STAFF PRIVILEGES BY EACH CLASS MEMBER.

In its essence, this case is based upon a claimed wrongful refusal to deal. This was repeatedly acknowledged by the district court and in fact alleged in the Amended Complaint, ¶¶26, 27, 196-197a. At trial, the only specific conduct by defendants alleged to be anti-osteopathic was the denial of staff privileges to plaintiff Weiss individually.

In this circumstance, the law of this Circuit is clear. Where the claim is based upon an unlawful refusal by defendant to deal with plaintiff, that plaintiff — and hence each class member — must allege and prove a demand which the defendant rejected. *Lawlor v. National Screen Service Corp.*, 270 F.2d 146, 154 (3d Cir. 1959), *cert. denied*, 362 U.S. 922 (1960) ("*Lawlor*"); *Mazus v. Department of Transportation*, 629 F.2d 870 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981 ("*Mazus*").[10]

The law clearly holds that people, like the class herein, who do not take the first minimal step of filling out and submitting an application form, cannot recover under the antitrust laws as a matter of law.[11]

Plaintiffs in *Lawlor* had filed both Sherman Act §1 and §2 counts, for both damages and injunctive relief.

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10. The scope of the Court's review is thus plenary, since the district court erred in formulating and applying the correct legal principle. This Court has already determined, and it thus is law of the case, that *Lawlor* is "a precedent relevant to the applicable substantive antitrust law" and that *Mazus* is "an analogous Title VII case." *DeMasi*, 669 F.2d at 118.

11. Particularly is this so where state law requires the use of an application in a form to be prescribed by the hospital. Nevertheless, the district court refused to decertify the class and denied motions for summary judgment, for directed verdict, and for judgment notwithstanding the verdict, all of which are presented in these appeals. See Parts II and VII below.

This Court held that, because plaintiffs had never attempted to obtain licenses from defendants, they were foreclosed from any relief under any of their counts.

As the Court stated in *Lawlor*, 270 F.2d at 154, quoted in *DeMasi*, 669 F.2d at 118,

> In the absence of such demand upon the part of plaintiffs, the courts have consistently held that there can be no recovery in an antitrust action.

Indeed, both before and since *Lawlor*, the courts have consistently applied the demand-refusal requirement as a condition precedent to recovery under the antitrust laws. See, *e.g.*, *Cleary v. National Distillers & Chem. Corp.*, 505 F.2d 695, 697 (9th Cir. 1974); *J. J. Theatres, Inc. v. Twentieth Century-Fox Film Corp.*, 212 F.2d 840, 845 (2d Cir. 1954); *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561, 568 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952); *Windy City Circulating Co., Inc. v. Charles Levy Circulating Co.*, 550 F.Supp. 960, 964 (N.D. Ill. 1982).

This Court has repeatedly recognized the continuing vitality of *Lawlor*. *DeMasi*, 669 F.2d at 118; *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 150 fn. 17 (3d Cir. 1981). In *Fleer Corp.*, the Court followed the reasoning of *Lawlor* which "stressed that the plaintiffs had never attempted to compete with National Screen by obtaining their own exclusive licenses . . . ." 658 F.2d at 150 n.17. In other words, in both *Fleer* and *Lawlor* the plaintiff failed to seek (by applying for it) the right it claimed was foreclosed to it. This requirement is one of fairness: How can a defendant be fairly charged with refusing to deal with the plaintiff if the latter has never even demanded such dealing?[12]

The requirement is also one of Pennsylvania state law. State Health Department regulations (28 Pa. Code

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12. The requirement is thus akin to the exhaustion of administrative remedies doctrine. *See Weinberger v. Salfi*, 422 U.S. 749, 764-765 (1975) (dismissal of class claims required where only the class representative had exhausted administrative remedies).

§107.2) require that a hospital's medical staff be limited to those who have applied pursuant to the hospital and staff by-laws. While Weiss applied on the prescribed form (5918a), it is undisputed that there is no class member who applied and was rejected. Hence no class member was eligible for York staff privileges.

These authorities and the general principle that a demand is required were vigorously and repeatedly presented to the district court. 177a-179a; 1743a-1745a; 1763a-1765a; 2592a-2606a. Without addressing them in any of its class action opinions, the trial court instead concluded that "this case is sufficiently analogous in purpose to a civil rights case" so that "a strict application . . . of the numerosity requirement is unwarranted." 1513a. Yet, that approach disregards this Court's comparable holding in *Mazus* that a demand (there in the form of an application) is essential to a civil rights claim of discriminatory hiring and promotion.

Specifically, in *Mazus*, the Court affirmed a refusal to certify a plaintff class. In language remarkably appropos this case, Judge Rosenn wrote for the Court:

> In this case there was no evidence that any other female ever applied for a roadworker job with PennDOT and was rejected. The statistical evidence is ambiguous at best. In sum, there is no evidence from which this court can conclude that the district court abused its discretion in failing to certify a class.

629 F.2d at 876, quoted in *DeMasi*, 669 F.2d at 118. Although there was ambiguous evidence on the class issue in *Mazus*, in this case there was *no evidence* of denial of York Hospital staff privileges to any other osteopathic physician beside Weiss. In fact, the uncontested facts establish that Weiss was the *only* osteopath to have applied for but been denied such privileges. 6332a, 548 F.Supp. at 1053.

Since the refusal to deal claim by Weiss requires an application followed by a rejection, this case is comparable to *Alexander v. Gino's, Inc.*, 621 F.2d 71 (3d Cir.

1980). There the Court affirmed the finding, reached in the absence of any evidence of other persons with claims comparable to plaintiff's, not "that the class was too small but that the plaintiff had failed to even show that one existed." 621 F.2d at 75.

As these cases amply demonstrate, given the uncontested fact that Weiss is the only osteopathic physician who applied for staff privileges but was turned down, the district court erred as a matter of law and totally abused its discretion by concluding — essentially in deliberate disregard for this Court's holdings in *Lawlor* and *Mazus*[13] — that plaintiff had established a claim for relief for the class sufficient to defeat motions to decertify the class and for summary judgment, directed verdict, and j.n.o.v.

In *DeMasi*, this Court denied extraordinary relief of mandamus, saying,

> The contention may also be raised again before the district court as it exercises its continuing responsibility to supervise the class under Fed. R. Civ. P. 23(c).

DeMasi, 669 F.2d at 118. Accordingly, a motion to decertify the class was filed in the district court, asserting this "demand" requirement and other issues. 2592a-2606a. Nevertheless, the district court denied the motion in an opinion which is totally silent as to this issue but instead merely states:

> The other arguments presented by the Defendants, having previously been fully considered by the Court. *See* Weiss vs. York County Hospital, No. 80-0134, slip op. (M.D.Pa. May 28, 1981), will not again be reviewed on the Defendants' motion for decertification of the class.

3229a. Yet, the cited opinion of May 28, 1981, nowhere

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13. See discussion, in the next paragraph, of the Motion to Decertify the Class and footnote 14 *infra*.

mentions *Lawlor* or *Mazus* or discusses the "demand" requirement.[14] 1505a-1524a.

II. CLASS CERTIFICATION IS IMPROPER IN THIS CASE.

A. Plaintiff Could not Establish Numerosity, Commonality of Issues, or General Application to the Class of Defendants' Alleged Conduct.

For the reasons discussed previously concerning *Lawlor*, *Mazus*, and the state law requirement that a physician submit an application for staff privileges (see Part I above), plaintiff could not and did not establish the requisite class numerosity, F.R.Civ. P. 23(a)(1)[15]; commonality of issues, Rule 23(a)(2), or the general applica-

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14. This was a repeated refusal by the trial court to recognize the binding authority of *Lawlor* and *Mazus*. Having earlier discussed the application of those decisions in briefs filed before and at the class action hearing, defendants reiterated them and the requirement of a demand in connection with the motion to vacate and reconsider the class certification. 1743a-1752a. The district court denied the motion to vacate and reconsider, stating that the arguments had "almost without exception . . . already been considered by this Court." 2116a. The court did not, however, address these cases and the "demand" argument. *Id.* Given the district court's total refusal to consider *Lawlor* and *Mazus*, even after this Court's opinion in *DeMasi*, defendants respectfully suggest that, in the event any issue is remanded, the case be assigned to a different district judge in the exercise of the Court's supervisory powers. *Lewis v. Curtis*, 671 F.2d 779, 789 (3d Cir. 1982).

15. To the extent the district court identified any factors bearing on "numerosity," those factors militated *against* class certification. These factors are "geographical distribution of the purported class members, difficulty in identifying individual members, and the inconvenience of joining all individual members . . . ." 1513a. Since the issue is whether the class is so numerous that joinder of individual members is not practicable, the geographical concentration of all purported class members in a portion of one county, the fact that all class members can be identified with "minimal effort" (1507a), and the fact that the class numbers no more than about 90 individuals (*id.*) who could obviously be joined with minimal inconvenience to plaintiff and the court all militate *strongly* against a finding of the requisite numerosity. The court did not cite or explain

tion to the putative class of the defendants' alleged conduct. Rule 23(b)(2). The scope of the Court's review is thus plenary because, in purporting to exercise discretion, the court below erred in formulating and applying the correct legal precept. As the Court explained in *Scott v. University of Delaware*, 601 F.2d 76, 84 n.14 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979) ("*Scott*"), only after it is clear that the district court properly determined the legal issues is its decision applying those principles subject to review for abuse of discretion.

B. Plaintiff is Neither Adequate Nor Typical as a Class Representative.

This Court described Weiss' experience as "unique." *DeMasi*, 669 F.2d at 116.

There are obviously two disparate groups subsumed in the class certified below: the osteopathic physicians who have not applied for staff privileges, allegedly dissuaded by fear, and the one applicant who applied and was rejected.[16] Under the Supreme Court's recent decision in *General Telephone Co. of the Southwest v. Falcon*, — U.S. —, 50 U.S.L.W. 4638 (U.S. 1982) ("*Falcon*") and *Scott*, *supra*, Weiss could not be the class representative for the former group, and the two groups could not be encompassed in the same class. The district court abused its discretion,[17] therefore, in certifying a class and in denying defendants' motion to decertify after *Falcon* was decided.

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what factors support such a finding of ultimate fact or conclusion. Further, the court's refusal to reconsider the class issue came after plaintiff served subpoenae upon over 100 M.D. physicians, thus amply demonstrating an ability to accomplish joinder of the smaller number of D.O. physicians without undue inconvenience. *See DeMasi*, *supra*. *Cf. In re Anthracite Coal Antitrust Litigation*, 78 F.R.D. 709 (M.D. Pa. 1978) (Muir, J.) (class of 141 entities throughout the state *denied* on numerosity grounds).

16. The class was also improperly defined to include all osteopaths in the region, including those who *were* admitted to the Staff.

17. The scope of the Court's review of this issue is whether the district court abused its discretion. *Scott*, *supra*.

In *Falcon*, the Supreme Court held that the plaintiff, an employee who was denied a promotion, was not an "adequate" or "typical" class representative of job applicants who were not hired. The Court explained that there is "a wide gap" between an individual's claim of discrimination and the existence of a Rule 23 class of persons who have suffered "the same injury" as that individual. 50 U.S.L.W. at 4641. The Court expressly rejected an "across the board" theory by which a plaintiff who suffered one kind of injury as the result of alleged discrimination could represent a class of people who suffered a different kind of injury allegedly because of the same discrimination.

Weiss has made precisely the untenable "across the board" assertion found impermissible in *Falcon*. Yet, at the same time, he has emphasized the factual, legal, and conceptual gulf that separates all non-applicants from himself:

> . . . denial of staff privileges is an event which, in and of itself, so besmirches the professional reputation of a physician that he is certain to lose business on account thereof. Thus, osteopathic physicians are directly injured by defendants' unlawful policy. If they fail to apply for privileges, they will suffer economic harm and if they apply for privileges, they will suffer economic harm.

Brief for Respondent Malcolm Weiss, filed October 22, 1981 in *DeMasi*, pp.25-26 (citations omitted).

It was critical for Weiss to prove that *each* non-applicant class member was *in fact* "dissuaded by fear" rather than choosing not to apply for other reasons. Clearly, proof of each non-applicant's dissuasion by fear is inherently individualized, and not appropriate for common proof. See *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211, 1226 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976). Worse yet, proof that Weiss was not dissuaded but in fact applied in 1976 and reactivated his application in 1977 directly conflicted with his obligation

to prove that class members were disuaded from applying.[18] The district court acknowledged this conflict by insisting, over defendants' objection, upon submitting the claims of Weiss and the class to the jury separately.[19] 5737a-5738a; 6236a-6277a. Yet the Court held in *Scott* that a proper class representative must suffer no impairment in his "incentive . . . in vigorously prosecuting *all* aspects of the case." 601 F.2d at 85 (emphasis supplied).

Futhermore, the kind of claimed injury is necessarily different for Weiss and the class: for Weiss, the alleged harm was actual refusal resulting in a "besmirching of professional reputation."[20] In contrast, for the remaining, supposedly "dissuaded" osteopaths, it necessarily was business foregone. They could not possibly show any "besmirching of reputation." Yet *Falcon* and this Court's decision in *Scott* hold unequivocably that a class representative must be part of the class *and suffer the same injury* as the class members. 50 U.S.L.W. at 4640; 601 F.2d at 86-89.

For the foregoing reasons, the class in this case must be decertified.

III. THERE IS NO CREDIBLE EVIDENCE OF IMPACT OR ANTITRUST CAUSATION AS A MATTER OF LAW.

At the threshold, before considering whether there were violations of Sherman Act §§1 and 2 established on this record, it is essential to recognize a fatal deficiency in plaintiff's case: he completely failed to establish impact, injury, fact of damage, or causal connection to an

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18. Only about one-third of the class has indicated a claim for damages in response to a post-trial notice to the class. 46a. At trial, no attempt was made to show dissuasion as to each class member.

19. Incredibly, the jury actually found facts favorable to the class, but not Weiss individually, as to a Sherman Act §1 claim. See Part IV.

20. While Weiss is unique in this regard, seven other osteopathic physicians applied for the staff privileges denied him. 6332a, 548 F.Supp. at 1053.

antitrust violation for himself or class members, by any credible, non-speculative, non-conjectural evidence. Accordingly, the judgment in favor of the class under §§1 and 2 and in favor of plaintiff Weiss under §2, must be reversed. As a matter of law, this is subject to the Court's plenary review.

Section 4 of the Clayton Act, 15 U.S.C. §15, requires a private antitrust plaintiff to prove an "injury" in his "business or property" "by reason of anything forbidden in the antitrust laws." This has translated into a requirement that there be concrete "injury in fact" which is proved by a preponderance of the evidence to have been "caused by" the violation. Both the impact (or fact of injury) and the causal connection must be proved with a fair degree of certainty, and without speculation or conjecture. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946); *Pitchford v. PEPI, Inc.*, 531 F.2d 92, 104-105 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976); *Rea v. Ford Motor Co.*, 497 F.2d 577, 589 (3d Cir. 1974), and cases cited at n. 25; *Deaktor v. Fox Grocery Co.*, 475 F.2d 1112, 1117 (3d Cir. 1973). *Accord, State of Alabama v. Blue Bird Body Co., Inc.*, 573 F.2d 309, 317 (5th Cir. 1978). As Judge Adams stated for the Court in *Pitchford*, 531 F.2d at 105, "It is not sufficient to show fact of damage by mere speculation or guesswork." The same is true in suits for injunctive relief. *Van Dyk Research Corp. v. Xerox Corp.*, 631 F.2d 251, 255 n.2 (3d Cir. 1980), *cert. denied*, 452 U.S. 905 (1981).

And in *Blue Bird Body*, 573 F.2d at 327, the court recognized that "impact is a question unique to each particular plaintiff and one that *must be proved with certainty*." (emphasis supplied)

Neither plaintiff nor class members established such impact at trial.

Plaintiff Weiss's First Amended Complaint at ¶32 (199a) boldly stated the various types of economic harm and injury that would be proved:

> 32. The contract, combination, and conspiracy so formed, and the acts and practices in furtherance

> thereof, have directly and proximately caused injury to the plaintiff and the members of the class in their business, trade, and property, *by causing them to suffer lost profits, diminished cash flow, loss of patient business, loss of goodwill, reduced income, and other forms of economic harm and injury.* (emphasis supplied)

However, none of these was proved for either Weiss or any class member.

A. Plaintiff Weiss

Dr. Weiss' theory of why he suffered injury requires an understanding of his role as a general practitioner.

Weiss was and is in private practice. At the time he applied to York, he stated he had a caseload of 225-250 patients per week. 3558a; Exh. P-16, 5918a.

Weiss had (and has) staff privileges at MOH. If one of his private patients needed hospitalization, he could and did admit his patients there. The record shows that MOH had, with a few limited exceptions, comparable facilities with York Hospital for most normal hospital services, such as general surgery.

In some cases, a patient Weiss had treated was instead admitted to York Hospital. This could happen in several ways. An accident victim might be taken to York's emergency department by ambulance. 3462a. Or a specialist to whom Weiss referred a patient could admit the patient to York. 3559a. Or the patient might simply prefer York as an institution and ask to be admitted there by another general practitioner with admitting privileges.

Weiss claimed economic injury on the following three grounds. First, he believed that he could not treat at York Hospital those of his patients who were admitted there. For example, if one of his patients had to undergo open-heart surgery, although as a family practitioner he obviously could not perform the operation whether or not he had staff privileges (5243a-5245a), "I would be there to hold the patient's hand, to reassure him. He's

about to undergo a terrible thing, and he knows me, not his heart surgeon." 3571a.

However, he testified that nothing prevented him from visiting his patients at York and reassuring them (and billing them for such reassurance) whether or not he had staff privileges. *He admitted he had never attempted to do so.*

Q: You can visit the patient at [York] hospital, can't you?

A: *I could visit the patient.*

Q: Isn't it true that because you are a doctor that there are no specific hours to which you are limited to visiting that patient?

A: It's my understanding that I'll have to make arrangements and somebody will have to tell the nursing staff to open the doors to Dr. Weiss. I just can't walk in. I think I'll be challenged.

Q: You think you will. Have you ever tried?

A: *Not at the York Hospital* but at other hospitals.

Q: You mean once your patient was put in the York Hospital, you never visited one patient that was put into York Hospital?

A: No. I do not go to the York Hospital.

3573a-3574a (emphasis supplied). He also claimed the York emergency department did not call him to assist in emergencies, whereas MOH did. 3578a. He admitted, however, that even were he put on the staff at York, MOH would remain his "primary" hospital. 3628a.

His second claimed injury was a supposed loss of patients following their stay at York. He claimed that following their discharge, some patients did not return to him as their family physician, but instead went to physicians whom they had met while they were hospitalized at York, or to whom they were referred, he claimed, by the specialists at York. 3545a. No such former patients

were called to explain the circumstances of their not continuing in Weiss' care.

Third, he opined that his reputation was damaged by not receiving staff privileges at York. He did not testify he had in fact suffered such harm, but rather that "the word *is going* to leak out" that his application was denied. 3538a. He was rejected in March, 1979, and testified in August, 1982.[21]

In apparently attempting to establish his fact of injury from the above, Weiss put into evidence, without further elaboration, his gross and net income from medical practice for the years 1976 through 1980:

	Gross Medical Income From Private Practice	Additional Medical Employment Income	Net Medical Income
1976	$124,669.45		$84,628.84
1977	$122,562.74		$72,414.00
1978	$113,728.20	$8,000 (at York County Prison	$65,881.61
1979	$123,409.45	$9,600 (at York County Prison)	$72,261.82
1980	$125,834.92	$10,900 (at York County Home)	$58,235.28

3646a-3648a; 5978a; 5982a-5983a.

In other words, his gross income from medicine increased from $122,562 in 1977 (in June of which his application was first rejected) to $133,009 in 1979 (in March of which his application was rejected for a second time) to $136,734 in 1980. His net income fluctuated amidst this steady increase. It was high in 1979, the year his application was rejected for the *second* time. There was no testimony explaining the decline in net income in 1980, while gross increased, or connecting it in any manner with the claimed violation, as opposed to rising costs or other explanations.

He did not testify whether his 225-250 patient

21. Plaintiff withdrew any claim of defamation following the close of the evidence. 5525a.

caseload per week in 1976 had increased, decreased, or remained the same in subsequent years, or why.

A rational jury, therefore, could not conclude that there was injury in fact or causal relationship proved without "speculation and guesswork."

In *Bigelow, supra*, the Supreme Court emphasized that "the jury may not render a verdict based upon speculation and guesswork." 327 U.S. at 264. Rather, the jury must be able to conclude (*id.*; emphasis supplied):

> As a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, *and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes*, that defendants' wrongful acts had caused damage to the plaintiff.

Here, as in *Rea v. Ford Motor Co.*, 497 F.2d at 589, the record provides no rational support for a determination, even by way of inference, that the defendants' actions caused any injury to the business or property of plaintiff. There was no evidence that plaintiff incurred greater operating expenses, lost sales, or lost profits because of the conduct of defendants. Similarly, as in *Deaktor v. Fox Grocery Company*, 475 F.2d at 1117, "plaintiff's causation theory was conjectural" and "the evidence concerning causation was speculative."

For the foregoing reasons, plaintiff failed to establish any impact, injury, fact of damage, or causal connection between himself and the antitrust claims he made. The judgment in his favor under Sherman Act §2 must therefore be reversed.

B. The Class

But whatever deficiencies plaintiff's own case encountered were dwarfed by the magnitude of the failure of proof as to all other class members.

There are 92 class members. Only four of them testified.

Dr. Charles Hash, a surgeon, testified that, *were* he to apply to York (which he had not), and *were* his application to experience what he described as "the long drawn out ordeal that Dr. Weiss had had in his application" then in that hypothetical eventuality:

> I think it *would* hurt my practice. It would certainly hurt my reputation. It *would* have many adverse effects upon my livelihood.

3602a.

He did not testify that any such thing *had* occurred. The law requires an injury in fact. It does not permit recovery for hypothetical "woulds."

He further testified about two incidents where he referred a patient to an M.D. physician and "never heard from the patient again." 3640a. He made no attempt to explain why this occurred or to link this incident with the claimed antitrust violation.

The second class member was Dr. Kieren Knapp, a general practitioner like Weiss. His testimony was merely that when he referred patients to specialists at York, he did not always receive reports back which he would have liked to receive. 3747a. He did not link that causally with the supposed antitrust claim or testify to any diminution of income or other cognizable injury.

Dr. Mark Illfelder, an osteopathic gastroenterologist and internist, testified that defendant Butler and his two professional colleagues declined joining the neurosurgical staff at MOH because they had a highly developed team and system for providing neurosurgery at York. "They didn't feel that they could provide the same kind of service" at MOH. 3772a.

In what manner is this incident, based upon sound considerations of medical practice, logically connected with any conceivable injury claimed by class members?

The last class member to testify was Dr. Jacques Surer, an osteopathic ophthalmologist. He testified he had "never sought privileges at the York Hospital." 3779a. Like Dr. Hash, he did not testify that he *had in fact* suffered any injury — rather, he conjectured he

"would" suffer such *if* he applied and *if* his application were twice rejected in the manner of Dr. Weiss. 3780a. Even though some of his patients referred to M.D.'s do not come back, he did not link this with any claimed violation of the antitrust laws. Quite the contrary, he testified he had a "very good rapport" with M.D. opthalmologists on the York Staff, and did joint consultations with several of them. 3790a.

Plaintiff's expert failed to furnish one iota of further evidence as to the injury supposedly sustained by class members. 3880a. He admitted he had made no study of plaintiff himself (3934a), let alone of any or all of the 92 class members.[22]

Despite the complaint's averments, there was no proof of "lost profits," "diminished cash flow," "loss of patient business," "loss of goodwill," "reduced income," or "other forms of economic harm and injury," nor any casual relationship between such and any claimed antitrust violations.

The requirement of *Bigelow and other cases* cited above is that *all* antitrust claimants must prove that an antitrust violation is a material cause of some concrete economic injury, with a fair degree of certainty, without speculation and conjecture. Neither plaintiff in his own right nor on behalf of the class did so. Accordingly, the judgments in their favor under §§1 and 2 of the Sherman Act must be reversed.

IV. THE JUDGMENT AGAINST THE STAFF UNDER SHERMAN ACT §1 MUST BE REVERSED.

The judgment entered with respect to Sherman Act §1 holds only the Staff liable and only to the class. Plain-

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22. In *Deaktor, supra*, this Court found the more extensive evidence of injury presented there to be nevertheless inadequate. 475 F.2d at 1117 n.4. *A fortiori*, here, neither the plaintiff nor his expert nor the several class members offered any competent proof of injury.

tiff Weiss did not receive a judgment in his favor.[23] The jury found there had been no unreasonable restraint of trade with respect to Weiss himself. Further, neither the Hospital nor any of the individual defendants were found to have conspired with each other or with anyone.

The judgment in favor of the class was "molded" by the trial court from answers to special verdict questions. Those answers and the trial court's findings of fact thereon are insufficient as a matter of law to support the judgment in favor of the class, which must therefore be vacated. The Court's review is thus plenary.

A. The Medical Staff Cannot Conspire with Itself.

It is of course fundamental that there must be more than one "conspirator" to sustain liability under Section One of the Sherman Act. Unilateral action cannot suffice as a matter of law. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). As the Court has held:

> Unilateral action, no matter what its motivation, cannot violate §1 [of the Sherman Act].

Edward J. Sweeney & Sons, Inc. v. Texaco, 637 F.2d 105, 110 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). *Accord, H. L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981), *cert. denied*, 51 U.S.L.W. 3258 (U.S. October 4, 1982).

In this case, there is no plurality of actors. "The individual Defendants have *not* violated the antitrust laws." Conclusion of Law 5, 6340a, 548 F. Supp. at 1601 (emphasis supplied). The Hospital was found not to have been a conspirator. Under these circumstances, finding the lone conspirator to be "The York Medical and Dental Staff" is legally insufficient, for the following reasons.

First, the district court correctly charged that the Hospital and Staff are one entity as a matter of law.

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23. Thus, this discussion assumes but does not concede that class certification was proper. But see Part II.

> Thus I instruct you that York Hospital and the Medical and Dental Staff of York Hospital must be regarded by you as a matter of law as *a single entity* which cannot conspire with itself.

5685a (emphasis supplied).

Further, the Pennsylvania Department of Health regulations unequivocally command that the Staff is part of the overall Hospital institution and is required to be "accountable to the governing body," the Hospital Board of Directors. 28 Pa. Code §§101.31, 103.1, 103.4(9), 107.1.[24] Thus, the Staff is no more than an unincorporated division of the Hospital and inseparable from it. 5685a.

Second, there is no evidence in the record identifying any possible "co-conspirator." Here, the individual defendants and the Hospital itself were *all* exonerated.

With whom, therefore, did this "Staff" conspire? The District Court's finding merely states cryptically "another person or entity." Finding of Fact 8, 6330a, 548 F.Supp. at 1051. That mysterious "other person or entity" is never identified.

Third, even plaintiff's own expert witness testified that the economic reality of the matter was that the Hospital and the Staff functioned as "one economic unit," "one firm," and "one organization." 3852a-3853a.

The awesome weight of treble damages and injunctive relief in favor of a plaintiff class cannot, in fairness and consistent with due process, be supported by such an empty record. The judgment in favor of the class and against the Staff under Sherman Act §1 must be reversed.

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24. These and other pertinent portions of such regulations are set forth in the Addendum hereto.

B. The Class has No Claim for Relief Under *Lawlor*.

Assuming *arguendo* that class certification was proper in this case, the Staff was entitled to judgment in its favor as a matter of law under *Lawlor*. See the discussion in Part I above. Since Pennsylvania Department of Health regulations, 28 Pa.Code §107.2, mandate that the Staff "be limited to physicians and dentists who have made application in accordance with the bylaws," judgment against the class was also required as a matter of law[25] under the state action doctrine. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97(1980); *Parker v. Brown*, 317 U.S. 341 (1943).

The district court also erred in failing to charge, based upon *Lawlor*, that the jury cannot find a refusal to deal with any physician who did not apply for staff privileges. Defendants' exception to the charge on this point was denied. 5746a-5747a.[26]

C. There is No §1 Relevant Market.

For the reasons discussed in Part V, A below, plaintiff was required, but failed, to prove a relevant service market. *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d at 148 n. 13.

V. THE JUDGMENT AGAINST YORK HOSPITAL BASED UPON SECTION TWO OF THE SHERMAN ACT MUST BE REVERSED.

The judgment assesses liability in favor of both Weiss and all class members for violations of Sherman Act §2 (6341a, 548 F.Supp. at 1062). Only the Hospital

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25. This is equally true under §2 of the Sherman Act.

26. Further, the trial court erroneously gave a "per se" charge under Sherman Act §1 as to the class claim. 5689a-5691a. Hospital staff privileges cases of the type here presented are governed by the "rule of reason" standard. *Dos Santos v. Columbus-Cuneo-Cabrini Med. Center*, 684 F.2d 1346, 1352 (7th Cir. 1982); *Pontius v. Children's Hospital*, 552 F.Supp. 1352 (W.D. Pa. 1982).

was found liable. All individual defendants and the Staff were exonerated.

This judgment is devoid of that minimum quantity of evidence necessary to support it. Therefore, the judgment must be reversed.[27]

The Court below molded the jury's special verdict answers to assess liability against York under each of the three prongs of Section Two: (a) monopolization; (b) attempt to monopolize; and (c) conspiracy to monopolize. Conclusions of Law 2-4, 6339a-6340a, 548 F.Supp. at 1060-61. These are examined in order.

A. There is No Monopolization as a Matter of Law.

The offense of monopolization has been set forth by the Court recently as follows:

> The offense of monopolizing under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant product and geographic market and (2) the wilful acquisition or maintenance of that power as distinguished from the growth or development as a consequence of a superior product, business acumen, or historic accident . . . . Monopoly power may be defined as the power to control prices and exclude competition with respect to a particular product and within a particular geographic market . . . ."

Borough of Lansdale v. Philadelphia Electric Co., 692 F.2d 307, 311 (3d Cir. 1982) (emphasis supplied) ("*Lansdale*").

Plaintiff's expert witness, Dr. Frech, provided virtually the only evidence to support plaintiff's §2 claims. He failed to provide a *prima facie* case for plaintiff, and in fact established that plaintiff and the class cannot recover on those claims, for the reasons which follow.

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27. The Court reviews all issues presented in this Part under the plenary standard for legal error.

1. The Service Market Defined is Inadequate as a Matter of Law.

The "product market" is the narrowest market which includes all competing products, or in this case, services. Sullivan, *Antitrust* §12, p. 41 (1977); II Areeda & Turner, *Antitrust Law* §517, p. 346 (1980). However, plaintiff's market was a welter of dozens of different services which do *not* compete.

Robinson v. Magovern, 521 F.Supp. 842, 877 (W.D. Pa. 1981), *aff'd*, 688 F.2d 824 (3d Cir.), *cert. denied*, 51 U.S.L.W. 3340 (1982), represents the correct approach to market definition. There, an open-heart surgeon brought an antitrust action for denial of hospital staff privileges. The court held the correct service market was "adult open heart surgery," 521 F.Supp. at 878. The court found this to be a "distinct market" from even pediatric open heart surgery, because the latter is for the correction of congenital heart defects, and the former for acquired defects. Hence, different skills and equipment are necessary for each. *Id. Accord, Pontius v. Children's Hospital*, 552 F.Supp. at 1366 (pediatric open heart surgery different service market from adult open heart surgery).

In *Robinson*, the court held that the touchstone is to include "all products *that consumers perceive as a reasonable substitute for each other*." 521 F.Supp at 878 (emphasis supplied). The court followed this Court's analysis in *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 30 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978), that it is the "perceptions . . . of consumers which are most salient in the determination of market boundaries."

Here, in contrast, Dr. Frech included in the same product market the universe of *all* health care provided by *anyone*. In his words, the relevant market was: "hospital *health care* supplied by *the hospitals* and their *medical staffs*." 3851a (emphasis supplied). He elaborated that this would include "*many different services*, obviously." 3851a (emphasis supplied).

That is legally incorrect, and indeed an absurd definition. Clearly, hospital patients do not perceive all such health care to be in competition with and "reasonable substitutes" for one another. Even within the same hospital (let alone among different hospitals), a heart surgeon does not compete with a dermatologist, nor an opthalmologist with an obstetrician. A patient needing a coronary by-pass does not perceive an operation for a detached retina to be a "reasonable substitute."

Dr. Frech did not purport to buttress his conclusory opinion on any study or evidence of any kind that patients perceive all health care to be essentially fungible. This complete failure of evidence contrasts dramatically with *Columbia Metal Culvert*, *supra*, for example, where the plaintiff carefully supported its assertion that aluminum culvert and steel culvert are in separate markets. 579 F.2d at 28-30.

Dr. Frech's utter failure to support his product market definition, coupled with the inherent absurdity of the market when tested against common sense, leads to the conclusion that it cannot be a basis for a judgment of liability. Since the definition infects all of the claims under §2, that judgment must be reversed in its entirety.[28]

Dr. Frech's definition was curious. In the normal antitrust action, a plaintiff attempts to prove the narrowest possible market. *See, e.g., Columbia Metal Culvert*, 579 F.2d at 25 (defendant's market share was 80% if plaintiff's definition of only aluminum culvert were used, but only 10% if defendant's definition of both aluminum and steel culvert were accepted). Here, plaintiff chose a definition that swallowed the universe — nursing, outpatient care, speech therapy, pastoral care, neonatal facilities, open heart surgery, psychiatric services, gastroenterology, and dozens of others, were all lumped together.

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28 The faulty market definition also infected the judgment in favor of the class under §1, since this is a rule of reason, not a per se, case. See *Columbia Metal Culvert*, 579 F.2d at 26, n.9, and Part IV above.

By setting forth this multitude of different markets as one product market, plaintiff succeeded in accomplishing three goals: first, he had one "monopoly" target to aim at. Second, he hid the reality that his own class members were in many different product markets. For example, his class member witnesses at trial were one general practitioner like himself (Dr. Knapp), one general surgeon (Dr. Hash), one gastroenterologist (Dr. Illfelder), and one opthalmologist (Dr. Surer). Significantly, none testified that either he or his patients considered his services fungible with those of all other hospital personnel.

Third, Frech was able to conclude that York had an 80% "market share" by simplisticly taking the average number of patients at York and MOH and multiplying that by the number of days in the year. 3862a-3863a.

This fundamental error in definition tainted the jury's answers to all of the §2 claims, regarding monopolization, attempt to monopolize, and conspiracy to monopolize. Accordingly, for this reason, the judgment under §2 must be reversed.

2. There is No Credible Evidence of Monopoly Power.

The verdict must also be reversed because there is no credible evidence of monopoly power. The possession of such power is a necessary element in a §2 claim. *Lansdale*, 692 F.2d at 311.

Dr. Frech did not believe that either York or its Staff had monopoly power in its own right. Rather, he testified that they "shared" monopoly power. 3934a. The "shared monopoly" theory has been rejected by the courts. *See FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1030 (2d Cir. 1976) (shared monopoly is "nothing more than §1 claim under another name"); *FTC v. Lonning and Kellog Company*, 539 F.2d 202, 204 (D.C. Cir. 1976); *Consolidated Terminal Systems v. ITT World Communications, Inc.*, 535 F.Supp. 225, 228-29 (S.D.N.Y. 1982) (shared monopoly is "tautological" and "does not in itself violate §2 of the Sherman Act. Rather, in order to sustain a charge of monopolization or at-

tempted monopolization, a plaintiff must allege the necessary market domination of a *particular* defendant.") (emphasis supplied).

Monopoly power requires proof of either "the power to control prices" or "the ability to exclude competition" in the relevant product and geographic market. *Id.*

Dr. Frech did not even recognize the "ability to exclude competition" test at all, and refused to testify thereto. He repeatedly stated that as an economist he recognized one test alone for monopoly power: "the power to raise prices without losing all your customers." 3896a, 3933-34a.

Therefore, it was reversible error for the lower court to have instructed the jury that it could find monopoly power based upon "the ability to exclude competition" (5702a-5704a), and it was reversible error for the lower court to have submitted special verdict questions 18 and 19 to the jury, (6255a-6256a), which permitted the jury to find monopoly power from the "ability to exclude competition." There is no credible evidence whatsoever on this point in the record. See *Rea v. Ford Motor Co.*, 497 F.2d at 590, n.28 (verdict for plaintiff reversed under §2 for failure to prove ability to exclude competition).

Turning to the remaining test for monopoly power, the "power to control prices," on which Dr. Frech totally relied, he fundamentally misconceived that test. He testified that the standard was whether an entity could "raise prices without losing *all* your customers." 3896a; 3933a-3934a.

That is just as faulty as his definition of the "product market." Under his test, virtually every business entity in the United States since post-World War II inflation began, including every sole proprietor, possesses "monopoly power." Virtually all have "raised their prices." Virtually none has lost "all of its customers."

Under this test, every hospital in the United States, and indeed every doctor, possesses monopoly power. Frech testified that every single hospital in the United States possesses "monopoly power." 3896-97a. This means that all would be presumably subject to potential

criminal sanctions under §2, as well as injunctive and treble damage claims. Indeed, Dr. Frech carried his "analysis" to its wholly consistent but absurd conclusion that plaintiff Weiss himself, as one of dozens of family practitioners in York County, *also possesses monopoly power*. 3934a.

Frech's simplistic view, of course, is not what monopoly power means. The real issue in defining monopoly power is whether the alleged monopolist can control prices so as to reap monopoly, supra-competitive profit margins:

> The purpose for market definition in a monopoly case is to see whether the alleged monopolist has power to maintain a price substantially higher than costs (or, by lowering price to competitive levels, to drive others out). . . . One must know . . . *whether cross-elasticity is high at prices closely related to cost, or whether the alleged monopolist has a substantial cost advantage which enables it to set prices at supra-competitive levels before the discipline of substitutes sets in.*

Sullivan, *Antitrust* at §16, p. 56 (emphasis supplied).

Similarly, Areeda and Turner state:

> Market power is control over price—the ability to increase net revenues by restricting output and thus raising price above its competitive level. *The degree of market power is measured by the excess of the profit-maximizing price over short-run marginal cost.*

II Areeda & Turner, *Antitrust Law* §513, p.337 (emphasis supplied). In their view, there is no presumption of "substantial market power," let alone "monopoly power," unless the firm's prices have typically exceeded average variable costs by 50% or more for a substantial period of time, or the firm's return on investment has exceeded its cost of capital by 50% or more for a substantial period of time. *Id.* Vol. III §803, p. 291.

Yet Dr. Frech had no opinion on cross-elasticity;[29] no opinion on the relation of York Hospital's prices to its costs; no opinion whether York had a "substantial cost advantage which enables it to set prices at supra-competitive levels before the discipline of substitutes sets in." He offered no opinion on the index of costs facing York and every other hospital — from increases in energy costs to orderlies' wages — to determine whether price increases had been greater than cost increases. He did not know whether any price increase by the Hospital was the result of an exercise of "monopoly power" as he defined it.[30] Dr. Frech admitted he made no attempt to study York Hospital's, or MOH's, costs or profit margins. 3955a. Further, he found that price was "a small part of the reason" patients chose York over other hospitals. 3910a.[31]

3. There is No Credible Evidence of Misuse of Monopoly Power.

Plaintiff needed to demonstrate not just that defendants possessed monopoly power, but that there was

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29. He stated he could not answer any question on cross-elasticity of demand between York and MOH because he had undertaken a study which turned out to be an "impossible econometric exercise." Frech concluded, "What you are asking is the price elasticity of demand for the two different hospitals and it's very difficult to estimate that." 3897a.

30. Q: Do you have any study that shows whether York Hospital in fact raised its prices as an exercise of this monopoly power?

A. Well, I think that's basically unanswerable. 3955a.

31. Dr. Frech's theory of why York Hospital had the ability to raise prices was simply that *all* hospitals automatically have such ability because third party payors like the federal government under Medicare, and insurance companies, including Blue Cross, Blue Shield, and others, pay most of the bills. He made no attempt to explain the relationship of hospital prices or costs to hospital profit margins, nor to explain competition among the third party payors or the dynamics of cost reimbursement. He simply opined that "many of the consumers have insurance so they don't even care [about price]." 3862a.

"wilful acquisition or maintenance of that power as distinguished from the growth or development as a consequence of a superior product, business acumen, or historic accident." *Lansdale*, 692 F.2d at 311.

Plaintiff's and his expert's theory of monopolization was that York and its staff had available to them at the Hospital certain services and facilities that MOH did not have. Specifically, Frech testified that these included a CT scanner (which MOH actually had), open heart surgery, neonatal intensive care, monitored stroke unit, audiology, burn care, dental services, electroencephalography, family planning, genetic counselling, pastoral care, pregnancy termination, prosthetic services, and speech therapy. 3861a-3869a.

Frech concluded that "the fact that York has many of these facilities that Memorial doesn't, it means for certain types of consumers, York is just a monopolist and they really don't have the option of going to Memorial Osteopathic because it doesn't have a crucial service." 3869a-3870a.[32]

Significantly, Frech did *not* testify that York had ever misused its supposed monopoly power in overcharging patients for these facilities and services. When Frech was asked whether York had ever misused such power, he opined it was "unanswerable" as to whether York had ever raised its prices as an exercise of monopoly power. 3955a. Yet that was the only test of monopolization Frech recognized.

Nor did Frech testify that York had ever "misused" any monopoly power in acquiring or maintaining these services and facilities upon which he based his conclusion that York is "just a monopolist." Quite the contrary.

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32. It is not apparent that plaintiff has standing to pursue this theory that York had "misused" its monopoly power by acquiring services and facilities not found at MOH. That claim would appear to belong to MOH, not to plaintiff or any class members herein. In any event, plaintiff as a general practitioner (as were 75% of his class members) could not utilize these specialized services and facilities, and thus lacks standing for another reason. 3802a-3805a.

these services and facilities appear from his testimony to be the consequence of York's growth and development as a quality hospital providing the full-range of hospital care.

Frech testified that the special services or facilities available at York had resulted because federal and state regulations, designed to keep health care costs down, allocated certain services and facilities among institutions to prevent duplication:

> . . . The idea was that hospitals were expanding too much, too many beds and too many fancy capital goods, fancy kinds of equipment and so on so that the regulation was to save costs by restricting expansion. 3876a.

This power of allocation is vested, *inter alia*, in the State Department of Health and the local HSA. See Health Care Facilities Act, 35 P.S. §448.101, et seq.

Frech further testified that patients go to York as opposed to MOH because it has "a better reputation — that's not quite the right word — has a different reputation with some consumers because it's an allopathic hospital versus an osteopathic hospital." 3879a. He also testified patients may perceive they are "going to get good quality care" there. 3964-3965a.

He testified that York did not desire, and it was not in York's economic interest, to exclude any physicians, whether osteopathic or allopathic. Quite the contrary, it was in York's interest to admit as many as possible. 3872a.

Finally, he testified that, as to the services and facilities above upon which he based his opinion that York was "just a monopolist," there was nothing that York was shown to have done to prevent MOH from acquiring many of those services itself.

Hence there is no evidence whatsoever in the record that York had ever misused its supposed monopoly power. *See Clark Marine Corp. v. Cargill, Inc.*, 226 F.Supp. 103 (E.D.La. 1964), *aff'd*, 345 F.2d 79 (5th Cir.

1965), *cert. denied*, 382 U.S. 1011 (1966) (defendants' superior position brought about by skill and lawful means; plaintiff was responsible for his own failure). *Accord, California Computer Products, Inc. v. IBM*, 613 F.2d 727 (9th Cir. 1979); *Telex Corp. v. IBM*, 510 F.2d 894, 928 (10th Cir. 1975).

For all of the foregoing reasons, the verdict against York based upon monopolization under Section Two must be reversed.

B. There is No Evidence of Attempt to Monopolize as a Matter of Law.

The court concluded that York Hospital had also committed the offense of an "attempt" to monopolize, based upon the jury's Special Verdicts 26-33.

To be supported, an attempt to monopolize judgment requires record evidence that: (1) York Hospital had a "specific intent" to monopolize the market for health and hospital services; (2) conduct in support of this and evidencing this intent; and, (3) a dangerous probability of achieving monopoly power. *Swift & Co. v. U.S.*, 196 U.S. 375, 396 (1905); *Coleman Motors Co. v. Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975); *U.S. v. Aluminum Co. of America*, 148 F.2d 416, 531-32 (2d Cir. 1945); III Areeda & Turner, *Antitrust Law* §820, p. 312. *But see, Sunshine Books, Ltd. v. Temple University*, 697 F.2d 90, 93 n. 9. (3d Cir. 1982).

As to the first, York clearly had no such "specific intent." *Human Resources Institute, Inc. v. Blue Cross of Virginia*, 498 F. Supp. 63, 67 (E.D. Va. 1980). Leaving aside all of the rebuttal evidence by defendants which disproved any such intent on the part of York, plaintiff's expert forthrightly negated any such intent: "the hospital per se, as an institution, would *like to admit all physicians, as many as possible*, get the maximum possible demand for the hospital's part." 3872a (emphasis supplied).

Similarly, of course, the conduct challenged, coupled with the Hospital's existing market position, would have to create a "dangerous probability" of achieving

monopoly power. *Swift, supra; American Tobacco Co. v. U.S.*, 328 U.S. 781, 785 (1946).

As previously discussed with respect to monopoly power, there was no proof to support a finding that York has even had substantial market power. *A fortiori*, there is none to support a conclusion York had a "dangerous probability" of achieving monopoly power.[33]

These elements are not hollow formulations. When, as here, the record conclusively shows the *absence* of any intent to monopolize; where plaintiff's own expert does not conclude that price rises by York were in furtherance of any monopoly power; where the only "exclusionary" conduct at issue is the rejection of one application for staff privileges which as a matter of law cannot further any market power by the Hospital, it is untenable to conclude that the high standards for "attempt to monopolize" have been met.

Accordingly, to the extent the judgment is based upon an "attempt to monopolize" by York Hospital, that judgment must be reversed.

C. There is No Evidence as a Matter of Law to Support a Conspiracy to Monopolize.

The third and final violation of Section Two found below is a "conspiracy to monopolize."

This requires proof of concerted action of the kind sufficient to support a Section One violation. Sullivan, *Antitrust* pp. 132-33. Such proof fails in this case. See Part IV above. Indeed, York was specifically exonerated from the Section One conspiracy — found *not* to have conspired "to impede reasonable, fair, equal or full access to staff privileges at York Hospital." Special Verdicts 11 and 13. 6247a; 6250a. How then can the Hospital rationally be deemed to have conspired "to obtain power to

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33 The court erred in instructing the jury that "dangerous probability" meant that "sooner or later" monopoly power would be achieved, which error requires at a minimum retrial of this claim. "Sooner or later" contradicts "dangerous probability." 5742a-5744a.

exclude competitors"? [34] Special Verdicts 34-36, 6271a, 6273a.

In addition, a Section Two conspiracy to monopolize requires considerably more stringent proof than a Section One conspiracy. It requires "proof of a concerted action deliberately entered into with the *specific intent* to accomplish the unlawful result of achieving a monopoly." *Sullivan, supra*, p. 132 (emphasis supplied). "[T]he critical fact to be established under a count for conspiracy to monopolize is the specific intent to monopolize." *Id.*, p. 133. *Accord, Fleer Corp. v. Topps Chewing Gum*, 658 F.2d at 153 ("specific intent to monopolize the relevant market is a necessary element of conspiracy to monopolize").

Finally, the offense requires "the commission of at least one overt act in furtherance of the conspiracy." *Sullivan supra*. There is no such act of record, other than the rejection of Weiss' application — *which was found by the jury not to have been an unreasonable restraint of trade for Section One purposes*[35] and therefore cannot, as a matter of law and common sense, be deemed an "overt act" in furtherance of the Section Two conspiracy.

For the foregoing reasons, to the extent the judgment against York was based upon a supposed "conspiracy to monopolize," that judgment must be reversed.

For all of the foregoing reasons, the judgment under Section Two of the Sherman Act in favor of plaintiff and all class members must be reversed.

VI. WEISS AND THE CLASS FAILED TO ESTABLISH A "NEXUS" TO INTERSTATE COMMERCE.

In order to bring an action under the Clayton Act by reason of violations of the Sherman Act, it is axiomatic that plaintiff must plead and prove a connection with interstate commerce. The connection must be either that the violation occurs "in" interstate commerce or that it

34. Appellants re-emphasize that in any event none of these "competitors" of York is before the Court.

35. Special Verdict No. 8, 6244a.

"affects" such commerce in a "not insubstantial" manner. *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232 (1980); *Hospital Bldg. Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976). In denying defendants' motions for directed verdict, judgment n.o.v. and requested jury charge, the court below erred in applying this legal precept. The Court's scope of review is thus plenary.

There have recently been four decisions rendered by district courts in this Circuit applying this general principle to the specifics of physician staff privileges denials. *See Pontius v. Children's Hospital*, 552 F. Supp. 1352 (W.D. Pa. 1982); *Cardio-Medical Assoc. v. Crozer-Chester Med. Ctr.*, 552 F. Supp. 1170 (E.D. Pa. 1982); *Pao v. Holy Redeemer Hosp.*, 547 F.Supp. 484 (E.D. Pa. 1982); *Cardio-Medical Assoc. v. Crozer-Chester Med. Ctr.*, 536 F.Supp. 1065 (E.D.Pa. 1982) ("*Cardio-Medical I*").

These cases establish that in any denial of hospital staff privileges case, the only relevant jurisdictional inquiry involves a determination of whether the defendant hospital's denial of staff privileges to the plaintiff physician substantially and directly affects the *plaintiff's* activities in interstate commerce. *Pontius*, 552 F.Supp. at 1361; *Cardio-Medical I*, 536 F.Supp. at 1076.

Here, there is *no evidence* of the effects of denial of staff privileges *upon the activities* of Weiss in interstate commerce. He did not attempt to prove any effects upon his purchase of drugs or other medical supplies, upon the payment of medical bills by insurers to him, or upon patients crossing state lines to see him. Similarly, there is no such evidence in the record concerning any member of the plaintiff class.

Accordingly, as a matter of law, the record is critically deficient of that minimum quantum of evidence from which a jury might reasonably conclude that plaintiff had established a "not insubstantial" effect upon interstate commerce by reason of the alleged violations of the antitrust laws. The jury's Special Verdicts 1-4 are thus unsupported and inadequate to establish either subject matter jurisdiction or entitlement to relief under

the antitrust laws. *A fortiori*, the trial court's Findings of Fact 1-4, 6330a, 548 F.Supp. at 1051, are clearly erroneous. The antitrust judgments against the Staff and the Hospital must therefore be reversed.

In addition, the district court's charge on interstate commerce incorrectly permitted the jury to find the requisite interstate commerce based upon a test broader than that permitted under law. 5761a-5763a.

VII. DEFENDANTS WERE ENTITLED TO SUMMARY JUDGMENT, A DIRECTED VERDICT, AND JUDGMENT N.O.V.

A. Summary Judgment

In June, 1981, defendants moved for summary judgment and submitted the affidavits of each of the ten individual defendants (who comprised the members of the Staff Executive Committee and the Judicial Review Committee); of Dr. Merle S. Bacastow, the Vice President-Medical Affairs of York Hospital; and of each of the sixteen members of the Board of Directors of York Hospital who voted on the application on March 19, 1979. These twenty-seven affidavits conclusively established that Weiss was not denied York Staff privileges because he was an osteopath. Rather, it appeared (Exh. D-10, 5956a-5958a) that

(1) Weiss was "unable on occasion to conduct himself in a manner that is conducive to harmonious relations with practitioners and Hospital personnel and conducive to high quality patient care," and

(2) Weiss, based upon his traits, personality, and past conduct, "would create in York Hospital an atmosphere which could be disruptive to other members of the York Hospital Medical Staff, administration, nurses and other employees, and could affect the quality of care and would not be in the best interest of the Hospital or its patients."

There is, therefore, no disputed evidence — and never has been — as to the few critical facts upon which all of plaintiff's and the class' claims are based: Weiss' status, as an osteopathic physician rather than an allopathic physician, was *not* a consideration in the individual and collective votes of the Board of Directors in rejecting his application. Nor was there any anti-competitive motive to the denial of the application. Additionally, there was substantial evidence to support the decision in the adverse reference letters challenging Weiss' "medical abilities and competence" (Exh. P-53, 5911a), reporting complaints of "incomplete exams" (Exh. P-76, 5913a), describing his lack of rapport with patients "of the lower socio-economic class" (Exh. P-52, 5909a-5910a), and asserting that Weiss' interest was "primarily in making money, 'certainly not delivering quality patient care' " (Exh. P-45, 5923a-5924a). Finally, no one other than Weiss applied for Staff privileges and was rejected.

Plaintiff, in response, submitted no credible evidence sufficient to raise a genuine issue of material fact as to the above issues, which barred his own claim. All of the class members' claims are barred as a matter of law under *Lawlor, supra*.

Therefore, the lower court seriously erred in refusing to grant summary judgment for defendants at that juncture under the settled Rule 56 standards of this Circuit and other courts, even in antitrust cases. *See First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968); *Owens v. Aetna Life & Casualty Co.*, 654 F.2d 218, 231 (3d Cir. 1981) (uncontroverted affidavits); *DeLong Corp. v. Raymond International, Inc.*, 622 F.2d 1135, 1142 (3d Cir. 1980); *Tripoli Co. v. Wella Corp.*, 425 F.2d 932 (3d Cir. 1970) (en banc) ("no contradiction whatsoever . . . of Wella's affidavits denying the resale price maintenance allegation"); *Weit v. Continental Ill. Nat. Bank & Trust Co.*, 641 F.2d 457, 462 (7th Cir. 1981) (plaintiffs must produce significant probative evidence suggesting an unlawful agreement); *Program En-*

gineering v. Triangle Publications, 634 F.2d 1188, 1195 (9th Cir. 1980) (defendants denied conspiracy and proferred "legitimate business reasons . . . for each of the allegedly conspiratorial acts"). The scope of review is thus plenary.

These cases all recognize that antitrust defendants are charged with serious conduct and are entitled to deny that conduct under oath, thereby putting plaintiffs to their proof. They also recognize that defendants frequently can do no more than deny the wrongful alleged conduct because of the difficulties of proving the negative thereof. These reasons take on special force in cases, such as this one, that are tremendously disruptive to the providers of health care. However, the district court refused to consider the affidavits. 2242a, 524 F.Supp. at 437.

As Judge Cohill correctly stated in granting summary judgment for defendants in *Pontius v. Children's Hospital*, 552 F.Supp. at 1362, which concerned the termination of hospital staff privileges to a pediatric heart surgeon:

> the erroneous denial of summary judgment in a case of this sort poses grave and unusual dangers to the proper administration of health care in this nation. . . . [T]he ability of hospitals to regulate their medical staffs will be seriously impaired. . . . [T]he discovery of incompetent physicians will be rendered extraordinarily difficult.

For the foregoing reasons, summary judgment for defendants should have been granted.

B. Directed Verdict and Judgment N.O.V. Should have been Granted.

For the same reasons, defendants' motions for directed verdict made at the close of plaintiff's case in chief (4561a) and of all of the evidence (5344a) should have been granted. The scope of review is again plenary.

Further, defendants requested and the district court denied a charge to the jury that the Board of Directors is the ultimate governing body of York Hospital, so that no

cause of action under any theory could be sustained in the absence of proof of wrongful involvement by the Board of Directors in its vote on Weiss' application. 3393a.

Similarly, defendants were entitled to judgment n.o.v. on this ground. In *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d at 115-116, this Court considered at length the vital role of a directed verdict at the close of plaintiff's case in an antitrust action where, as here, all of the liability evidence was circumstantial:

> In removing a case from the jury, the court undertakes the vital task of protecting neutral principles of law from powerful forces outside the scope of the law — compassion and prejudice. . . .
> The court's role is especially crucial when, as here, the plaintiff's case, and therefore the defendant's liability, is based solely on circumstantial evidence.
>
> When a trial court grants a directed verdict in a circumstantial evidence case, the court . . . decides that no reasonable person could reach the suggested conclusion on the basis of the hard evidence without resorting to guesswork or conjecture.

VIII. THE INJUNCTION MUST BE VACATED.

The district court entered an injunction against the Hospital and Staff pursuant to Section 16 of the Clayton Act, 15 U.S.C. §26. The terms of the injunction are described in the Statement of the Case.

The injunction is unsupportable and thus must be vacated.[36]

This Court in *Mid-West Paper Products v. Continental Group*, 596 F.2d 573 (3rd Cir. 1979), emphasized that there must be "a *significant* threat of injury from an

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36. The scope of the Court's review is abuse of discretion. However, since there is no "violation of the antitrust laws", as set forth elsewhere in this Brief, the injunction must fail. 15 U.S.C. §26. In addition, the injunction runs in favor of all class members. If the class is ordered decertified, the injunction must also be vacated for that reason.

impending violation of the antitrust laws or from a *contemporary violation likely to continue or recur.*" (emphasis supplied) The Court re-emphasized the "significant threat" test. *Id.* at 594, n. 85. Here, a single osteopath has been denied staff privileges at York. Six other osteopaths have been admitted to such privileges, and one has not pressed his application (by supplying requested information). This is an improper and insufficient record to find there is "threatened" injury to the class of osteopathic physicians.

Further, injunctive relief of any kind in this Circuit requires that there be no adequate remedy at law. *Goadby v. Philadelphia Electric Co.*, 639 F.2d 117, 122 (3d Cir. 1981). Plaintiff and all class members have sued for monetary damages, and have failed to show why there is no adequate remedy at law.

In addition, the injunction entered below is overbroad, internally inconsistent, and vague and goes beyond the record. The Supreme Court has recognized the seriousness of this defect, explaining:

> the specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood.

Schmidt v. Lessard, 414 U.S. 473, 476 (1974).[37] The injunction here fails to comply with this standard. Paragraph 1.1 restrains and enjoins the Hospital and Staff from:

> undertaking any overt act against either Plaintiff Weiss or members of the Plaintiff Class which would in any way impede or deny the Plaintiffs full, reasonable, fair or equal access to the facilities of

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37. For the same reason, the court's finding of fact 8 is ambiguous (6330a, 548 F.Supp. at 1051). See also, *International Longshoremen's Association v. Philadelphia Marine Trade Association*, 389 U.S. 64, 76 (1967).

> York Hospital, and full, reasonable, fair or equal access to staff privileges at the York Hospital.

6340a, 548 F.Supp. at 1061.

"*Full* access" to the "facilities" and "staff privileges," read literally, may mean, and appears to mean on its face, that *all* osteopathic applicants *must* be accepted, no matter what their qualifications. An "overt act," construed literally, includes a decision to reject an application on its merits. If York cannot take any "act . . . in *any* way [to] impede or deny *full* . . . access . . . to staff privileges," then the Board of Directors can exercise no discretion or discharge its duty, mandated by state law, to ensure the best quality of patient care.

Worse yet, the injunction commands access to York's "facilities" separate from access to "staff privileges." Under this injunction, an osteopathic general practitioner can demand, in the name of "full" access to York's "facilities," to perform there complex and delicate brain surgery, even if the physician is not qualified to do it. In this and myriad other real-life possibilities, there is an inherent contradiction between "full" access and "reasonable" or "fair" access. "Equal" is meaningless without a stated standard of comparison.

As set forth above, an injunction cannot stand where its commands are so vague and sweeping, and so internally inconsistent and contradictory, that those who are restrained and enjoined cannot have a clear understanding of what they are supposed to do and not do. A remedy of civil, or even criminal contempt, is available for violation of this injunction. York must operate under the apprehension that any false step — "*any* overt act" — triggers such contempt, without any guidance as to what act is permitted and what not permitted.

The vague sweep of the injunction is ironic in view of the court's apparent intention to reject any "affirmative action."

> Furthermore, the kind of "affirmative action" which Plaintiff Weiss and the Plaintiff Class request would

> be appropriate only were there evidence of invidious discrimination. *No such evidence has been presented.*

6339a, 548 F.Supp. at 1060 (emphasis supplied). Yet the injunction appears to achieve by vagueness and overbreadth what the court found there was no basis to order specifically.

Finally, paragraph 1.3 of the injunction constitutes an unwarranted intrusion into the York medical decision-making process. At present the Staff by-laws establish a standard for certain privileges based upon one's eligibility for "examination by the appropriate American Board of Medical Specialties, or require professional training and professional credentials, equivalent thereto." [5966a, §9a]. The injunction enjoins the Hospital and Staff

> from interpreting the expression "American Board of Medical Specialty" as used in the York Hospital Medical Staff By-Laws to exclude osteopathic boards of medical specialty.

6340a, 548 F.Supp. at 1061.

There is absolutely nothing in the record upon which the lower court could determine that the standards of any specific M.D. specialty board are or are not the same as those of the D.O. board in the same specialty. Further, there is no finding by the court to support such a conclusion. In any event, the by-laws are fair because they permit any applicant, M.D. or D.O., to show equivalent qualifications.

It is precisely this entanglement in day-to-day operational decisions which the court in *Penn Central Co. v. Buckley & Co.*, 293 F.Supp. 653, 658-59 (D. N.J. 1968), *aff'd*, 415 F.2d 762 (3d Cir. 1969), held to be improper. Moreover, to the extent the court would be attempting to substitute its evaluation of the credentials of physicians for that of York, it would run counter to the holding in *Rearick v. Holstein-Friesian Ass'n.*, 472 F.Supp. 464 (W.D. Pa. 1979), and cases cited therein. *See also*,

Hoffman v. Garden-City Osteopathic, 1982-2 Trade Cases (CCH) ¶64,859 at pp. 72,273-74 (Mich. App., 1982).

Again, ironically, the Court purported not to be intrusive.

> Some of the relief [requested by plaintiff] such as amendments to the By-Laws of the York Hospital Medical Staff are grossly intrusive upon the autonomy of that body and are unjustified under the circumstances. Further, this Court is of the opinion that it has neither the technical expertise nor appropriate guidance from the parties to consider modifications of the by-laws as proposed by Plaintiff Weiss and the Plaintiff Class.

6339a, 548 F.Supp. 1060. Nevertheless, paragraph 1.3 effects a significant change of medical standards in the absence of such expertise and guidance.

For all of the foregoing reasons, the injunction must be vacated.

IX. THE JUDGMENT FOR INTERFERENCE WITH CONTRACTURAL RELATIONS IS UNSUPPORTED BY THE EVIDENCE AND MUST BE REVERSED.

The First Amended Complaint contains only a vague reference to an unspecified violation of "the common law of the State of Pennsylvania" arising out of the denial of Staff privileges. 202a. However, the lower court erroneously permitted plaintiff to submit to the jury a claim for intentional interference with Weiss' contractual relations which had nothing to do with the denial of his staff application. The claim was individual, not on behalf of a class. The jury found that the Hospital and Drs. Bauer, Butler, Deisher, and Kushner had "intentionally interfered, without proper cause," with Weiss' contracts, which was a "substantial cause of injury" to Weiss. Finding of Fact 28, 6331a, 548 F.Supp. at 1052. There is no evidence whatsoever to support that

verdict, and the resulting judgment must therefore be reversed.[38]

Following is the testimony of Weiss upon which this verdict appears to be based:

> Q What have you done when you had a patient who has presented himself with say signs that indicate they need coronary angiography.
>
> A I have cooperated fully in having them go to the York Hospital for further tests. I have recommended that they do this.
>
> Q And have you received reports back from the hospital as to whether or not they have gone over and had this procedure.
>
> A Sometimes I do and sometimes I don't.
>
> Q And do you get the patient back.
>
> A Not always.
>
> Q What happens, if you know.
>
> A Usually they're referred to another doctor on the staff. They'll go for their specialized therapy whether it be open heart surgery, whether it will be treatment for cancer, radiation treatment. And they may have had another problem that I had been taking care of like diabetes and they turn around and they refer the patient to their family practice department or to somebody else on their staff instead of back to me.

3545a.

In sum, the testimony was merely that Weiss did not "always" get a patient back, and he described what he thought were the circumstances in such cases. Those circumstances did not result from the denial of staff privileges but from the action of some unspecified "they" who "refer the patient to their family practice department or to somebody else on their staff instead of back to me." *Id.*

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38. Since the absence of a minimum quantity of evidence to support the judgment is an issue of law, the scope of the Court's review is plenary.

Nowhere does Weiss link this referral to actions by Drs. Bauer, Butler, Deisher, and Kushner. Indeed, Drs. Bauer, a general surgeon, and Deisher, an obstetrician-gynecologist, are not in such specialities as to require Weiss to refer patients to them, since the same services they perform are also available at MOH. Further, there is no evidence linking the actions of private practice physicians, whoever they may be, to York itself.

In the same fashion, Weiss never identified any particular lost patient. No patient testified. It is thus mere speculation to assume that the patients did not initiate the change by asking for the name of a different family doctor who would not give merely a "very superficial . . . examination." Exh. P-53, 5911a. Indeed, some of Weiss' patients did have such complaints and did themselves seek out new family physicians. *Id.*

Thus, Weiss' proof lacked the most basic element — the existence of a contract. The basic assumption underlying the cause of action for intentional interference with contract is that the plaintiff is in fact a party to an existing contract. *Glenn v. Point Park College*, 441 Pa. 474, 272 A.2d 895, 898 (1971).[39] Further, it has long been held by Pennsylvania courts that a plaintiff can only recover for interference with contract if he proves that defendant interfered with a "known contract or business relation." *E.g., Glazer v. Chandler*, 414 Pa. 304, 308, 200 A.2d 416, 418 (1964); *Dora v. Dora*, 392 Pa. 433, 141 A.2d 587, 590 (1958).

But, as we have seen, Weiss introduced no evidence whatsoever of the existence of any specific contracts with which he claims defendants interfered, nor did he even identify any patients whom he claims to have lost as a result of defendants' conduct.

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39. Weiss did not pursue a claim for interference with prospective contractual relations. Rather, the claim addressed, and the judgment below pertains only to, interference with contractual relations existing at the time of his rejection. This Court acknowledged the distinction between the two claims in *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 898 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981).

Further, since the claim relates to existing contracts, Weiss was required, but failed, to show that the relationships he had with patients existed at the time of some specific conduct by each of the four individual defendants and the Hospital. Weiss' testimony gave no dates, just as it gave no other particulars identifying the patients or other physicians involved.

Because of this failure to prove the existence of any contracts, Weiss also failed to prove two additional elements of the cause of action. These are the defendant's "knowledge of the contract with which he is interfering and of the fact that he is interfering with the performance of the contract," *Restatement (Second) of Torts* §766 (comment i); *See, e.g., Morgan's Home Equipment Corp. v. Martucci*, 390 Pa. 618, 136 A.2d 838, 846 (1957); *General Business Services, Inc. v. Rouse*, 495 F.Supp. 526, 542-43 (E.D. Pa. 1980), as well as proof of intent to interfere, *Restatement (Second) of Torts*, §766A. *See Glenn v. Point Park College*, 441 Pa. 474, 272 A.2d 895, 899 (1971).

As the foregoing establishes, the jury was left to speculate as to the existence of any specific patients or contracts, the identity of any person who may have interfered with them, the knowledge by such person of the existence of the contract, and the actual injury to plaintiff's medical practice.

Thus, the judgment for interference with contractual relations must be reversed.

X. DEFENDANTS WERE ENTITLED TO A JURY DRAWN FROM THE HARRISBURG DIVISION OF THE TRIAL COURT.

Congress has declared that all litigants "have the right" to trial before a jury "selected at random from a fair cross section of the community in the district or division wherein the court convenes." Jury Selection and Service Act of 1968, as amended, 28 U.S.C. §1861 (the "Jury Act"). In accordance with the district court's plan adopted pursuant to the Jury Act, only by a trial in Har-

risburg could a jury be drawn from a fair cross section of the parties' community and division.

The Harrisburg Division is where this action was commenced, and where defendants were entitled to be tried under 28 U.S.C. §1393(a).[40] That section provides that defendants residing in the same division of a large district are entitled to trial in that division. The section has consistently been applied to cases where multiple defendants all reside in the same division. *McCroskey v. Texas Marine Survey Co., Inc.*, 87 F.R.D. 691 (S. D. Tex. 1980); *Roark v. Bauer*, 181 F.Supp. 330 (N.D. Oh. 1960); *Lavietes v. Ferro Stamping & Mfg. Co.*, 19 F.Supp. 561 (E.D. Mich. 1937); *Barfield v. Zenith Tire & Rubber Co.*, 9 F.2d 204 (N.D. Oh. 1924); I Moore, *Federal Practice* ¶0.143[4] (2d. ed. 1980). Similarly, the statute protects a corporate defendant which is a resident of the division. *Torres v. Continental Bus System, Inc.*, 204 F.Supp. 347 (S.D. Tex 1962).

Clearly, all individual defendants are residents of York County. Similarly, York Hospital, including its Staff, maintains its only place of business there. And York County is even where the plaintiff's (and the class') entire cause of action allegedly accrued.

Pursuant to the Jury Act, the district court divided itself into divisions.[41] Jurors are drawn for service from different counties, depending upon the division in which the jury is to sit. Jurors drawn from York County serve *only* in the Harrisburg Division. Consequently, a trial by the defendants' peers drawn from a fair cross section of the community in their division could only be had in Harrisburg. In unequivocal language, Congress declared that these defendants thus "have the right" to be

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40. In denying defendants' motion for trial in Harrisburg, the district court erred in formulating and applying this legal right. This Court's scope of review is thus plenary.

41. In the Jury Act, "division" refers to the geographical portion of the district from which jurors are picked to serve at trials held in that portion of the district. 28 U.S.C. §1869(e).

tried before a jury drawn from such a cross section in Harrisburg.[42] 28 U.S.C. §1861.

This is a significant right which defendants timely claimed by pretrial motion both in writing and orally. 2568a-2575a. They objected that a jury from outside the Harrisburg Division was not representative of the community in the division and was not drawn from a community containing the diversity of minority groups who inhabit both York itself and the Harrisburg Division, but are not found in any substantial number in the rural counties from which juries in Lewisburg and Williamsport are drawn.

Defendants suffered additional prejudice by virtue of distance. Harrisburg is only about 25 miles from York whereas Lewisburg and Williamsport are at least 91 and 118 miles, respectively, from York. Almost all witnesses were from York County, and the ten individual defendants were physicians whose patients, practices, and homes were all located in York County. Even the class members were all from that county. The balance of fairness leaned overwhelmingly toward Harrisburg as the situs for trial. The district court nevertheless refused to *require* trial in Harrisburg. 2582a-2584a.

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42. Local Rule (M.D.Pa.) 407.1 incorporates the same policy that trial should only be convened at the place for holding court which is closest to the place of residence or principal place of business of the principal defendant.

CONCLUSION

For all the foregoing reasons, the judgment in the court below must be reversed in its entirety. In the alternative, these appellants are entitled to a new trial as to those issues upon which liability was found below and judgment is not reversed. In either event, the injunction must be dissolved.

Respectfully submitted,

Dated: June 30, 1983

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MEMBERSHIP IN THE BAR OF THE COURT

It is hereby certified that Stuart H. Savett, Esq., David H. Weinstein, Esq., Robert J. LaRocca, Esq., and Robert J. Brown, Esq., are members in good standing of the Bar of the Court.

/s/ DAVID H. WEINSTEIN

COMPENDIUM OF STATE LAW CONCERNING DISCRIMINATION IN STAFF PRIVILEGES

ARKANSAS:

In *Ware v. Benedict*, 280 S.W. 2d 234, 225 Ark. 185 (Ark. 1955) the court held that a hospital cannot deprive a physician of his right to practice by rules, regulations or actions that are "unreasonable, arbitrary, or capricious."

CALIFORNIA:

Section 2453 of the California Business & Professional Code (West 1985 Supp.) states that there shall be no discrimination in granting staff privileges on the basis of whether a physician holds an M.D. or a D.O. degree. *See also, Rosner v. Eden Township Hospital District*, 25 Cal. Rptr. 551, 58 C.2d 592, 375 P.2d 431 (Cal. 1961).

COLORADO:

Colorado Rev. Stat. Section 25-3-103.5 (1984 Supp.) provides that hospitals shall not discriminate in granting staff privileges on the basis of whether the physician holds an M.D. or a D.O. degree. *See also, Newton v. Board of Commissioners of Weld County*, 282 P.2d 1068, 86 Colo. 446 (Colo. 1929).

FLORIDA:

Fla. Stat. Ann. Section 395.011 (West Supp. 1984) provides that hospitals may not discriminate between M.D.s and D.O.s in acting on an application for staff membership.

HAWAII:

Hawaii Rev. Stat. Section 460-11 (1976) precludes discrimination between osteopathic and allopathic physicians in "public institutions."

INDIANA:

Ind. Code Ann. Section 16-12-21-33 and Section 16-12.1-5-1(b) prohibit discrimination between osteopathic physicians and allopathic physicians in granting staff privileges.

IOWA:

Iowa Code Ann. Section 347.18 (1983) provides that county hospitals may not discriminate between practitioners of any school of medicine.

KANSAS:

Kan. Stat. Ann. Sections 14-612 and 19-1813 (1975 & 1981) prohibit discrimination based on medical degree by city and county hospitals.

MARYLAND:

State v. Good Samaritan Hospital of Maryland, 473 A.2d 892 (Md. 1984) prohibits discrimination between medical providers based on academic degree.

MICHIGAN:

Mich. Comp. Laws Ann. Section 331.163 (1980) provides that osteopathic physicians may not be excluded from county hospitals. *See*, Op. Atty. Gen. 1976, No. 5049, p. 534.

MISSOURI:

Mo. Ann. Stat. Section 205.300 (Vernon 1983) provides that county hospitals may not discriminate against osteopathic physicians. *See also, Stribling v. Jolley*, 253 S.W. 2d 519, 241 Mo. App. 1123 (Mo. Ct. App. 1952).

MONTANA:

Mont. Code Ann. Section 50-5-105(2) makes it unlawful for hospitals to discriminate among the patients of licensed physicians, including osteopathic physicians.

NEVADA:

Nev. Rev. Stat. Section 450.430 (1983) prohibits discrimination against osteopathic physicians.

NEW JERSEY

By case law, discrimination in the granting staff privileges between osteopathic physicians and allopathic physicians is prohibited. *See*, *Greisman v. Newcomb Hospital*, 192 A.2d 817 (N.J. 1963).

NEW MEXICO

N.M. Rev. Stat. Ann. Section 61-10-14 (1981 Supp.) provides that osteopathic physicians shall have rights equal to physicians and surgeons of all other schools of practice.

NEW YORK

N.Y. Pub. Health Law Section 2801-(b)(1) (McKinney 1977) prohibits denial of privileges for reasons "unrelated to standards of patient care, patient welfare, the objectives of the institution or character and competency of the applicant."

OHIO:

Ohio Rev. Code Ann. Section 3701.351(b) (Page 1983) prohibits hospitals from denying staff privileges based on the fact that the applicant is an osteopathic physician.

PENNSYLVANIA

28 Pa. Admin. Code Section 107.2 and 107.3(c)(1984) provides that no applicant shall be denied medical staff privileges on the basis of any criterion lacking professional or ethical justification.

RHODE ISLAND

R.I. Gen. Laws Section 5-36-3 (1976) holds that osteopaths are entitled to equal privileges.

SOUTH CAROLINA

S.C. Code Ann. Section 44-7-770 (1977) prohibits discrimination against osteopathic physicians by county, township and municipal hospitals.

SOUTH DAKOTA

S.D. Codified Laws Ann. 34-8-8.1 (1984 Supp.) prohibits discrimination in the granting of staff privileges "between licensed practitioners of the various healing arts."

TEXAS

Tex. Rev. Civ. Stat. Ann. Art. 4495(b), Section 3.06(a) (Vernon 1985 Supp.) prohibits discrimination "against a school or system of medicine."

VIRGINIA

Va. Code Section 32.1-134.1 (1979) prohibits denial of staff privileges unrelated to standards of patient care.

WEST VIRGINIA

W. Va. Code Section 30-14-9 provides "osteopathic physicians and surgeons licensed hereunder shall have the same rights and privileges as physicians and surgeons of other schools of medicine."

WYOMING

Wyo. Stat. Section 32-2-113 (1984 Supp.) provides that any hospital whose support is derived in whole or part from public funds may not discriminate against doctors of osteopathy.